

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :

ABKCO MUSIC, INC., et al., : Docket #15cv4025

Plaintiffs, :

- against - :

SAGAN, et al., : New York, New York
December 7, 2016
Defendants. :

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PROCEEDINGS BEFORE
THE HONORABLE HENRY PITMAN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: LOEB & LOEB LLP
BY: BARRY SLOTNICK, ESQ.
TAL DICKSTEIN, ESQ.
CHRISTOPHER CARBONE, ESQ.
345 Park Avenue
New York, New York 10154

For Defendants: WINSTON & STRAWN LLP
BY: MICHAEL S. ELKIN, ESQ.
ERIN RANAHER, ESQ.
200 Park Avenue
New York, New York 10166

Transcription Service: Carole Ludwig, *Transcription Services*
141 East Third Street #3E
New York, New York 10009
Phone: (212) 420-0771
Fax: (212) 420-6007

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: ABKCO Music against Sagan. Counsel,
3 please state your name for the record.

4 MR. BARRY SLOTNICK: Barry Slotnick, Tal
5 Dickstein, and Chris Carbone from Loeb & Loeb for
6 plaintiffs.

7 MR. MICHAEL ELKIN: Good afternoon, Your Honor,
8 Michael Elkin and Erin Ranahan from Winston & Strawn,
9 counsel for Sagan, et al., defendants.

10 THE COURT: All right, good afternoon. We are
11 here to address some discovery disputes concerning
12 depositions and document requests. Let me just go over the
13 correspondence that I have. I have Mr. Elkin's letter of
14 November 18. I'm not cataloguing the attachments, listing
15 the attachments. Mr. Elkin's November 19; Mr. Dickstein,
16 November 23; Mr. Elkin, February 5; and Mr. Slotnick - I'm
17 sorry, the last one was Mr. Elkin, December 5, excuse me;
18 and Mr. Slotnick, December 6. I take it that's the universe
19 of relevant correspondence?

20 MR. ELKIN: Yes, Your Honor.

21 MR. SLOTNICK: Yes, Your Honor.

22 THE COURT: All right. Why don't I hear from -
23 well, let's talk about the deposition issues first. Why
24 don't I hear from Mr. Elkin and then I'll hear I guess it's
25 gonna be Mr. Slotnick. Go ahead.

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2 MR. ELKIN: Thank you, Your Honor.

3 THE COURT: By the way, everybody can remain
4 seated. That'll be more comfortable. Go ahead.

5 MR. ELKIN: Your Honor, the depositions that are
6 at issue in the case relate to certain non-party witnesses,
7 and I hope it would be helpful to the Court if I just spent
8 a minute or two on what I think are erroneous references to
9 the initial conference before the district judge because I
10 think it's --

11 THE COURT: I just read the transcript of that
12 during lunch. I re-read it again during lunch, so I don't
13 think you need to. Go ahead.

14 MR. ELKIN: If I may, Your Honor, there are three
15 essential facets of our client's business, and I'm referring
16 to it in a collective sense for purposes of this argument,
17 that essentially boil down to two violations under Section
18 106 of the Copyright Statute, the right of reproduction and
19 the right of public performance. I think also the right of
20 distribution. It's not clear to me, frankly, whether the
21 right of public performance is at issue, but I'm assuming
22 for purposes of this argument that it may be.

23 Our clients are engaged, among other things, in
24 streaming both linear broadcast and on-demand or streams of
25 audio recordings as well as certain video recordings. And

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2 that implicates potentially three rights that are at issue
3 in the case as far as we can discern. What is, of course,
4 streaming of the performances from this concert recordings
5 is something that would trigger the right of public
6 performance. The second right that I believe is at issue
7 here are the downloads of the audio recordings that are
8 available, and the on-demand streams that are available at
9 our clients' websites. And then there is these audio-visual
10 footage from these concerns, rock and roll concerts that
11 took place over the years.

12 Our defenses with respect to the streaming itself
13 is the fact that our client has licenses with the three U.S.
14 performing rights society, SESAC, ASCAP, and BMI. With
15 regard to the on-demand streams and the downloads, which I
16 believe are claimed to be triggering the exclusive right of
17 reproduction violation, our client is relying on a Section
18 115 compulsory licenses which take the form of notice of
19 intent and payment under the statute. I'll get into in a
20 moment what's relevant there.

21 Then there's the third issue that they're
22 claiming, which is the so-called synchronization right which
23 is a species of the right of reproduction under the
24 Copyright Law, as Your Honor well knows. And there I gather
25 what they're claiming is that because there are music

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2 compositions that are synchronized in the audio-visual
3 recordings that are available on our client's website, and
4 it doesn't have permission or license to be able to use
5 them.

6 With regard to that aspect, the synchronization,
7 that is what is at issue for us, that is to say the
8 defendants, Your Honor, relative to our request to take
9 certain nonparty witness depositions. First of all, we are
10 taking issue as a matter of law, and this will be something
11 that will have to be decided at some point in the case, is
12 whether our client even needed to have a so-called
13 synchronization license which is typically, as Your Honor
14 well knows, there's a, let's say a video that someone that's
15 going to be exhibited either on television or motion
16 picture, and someone puts audio record to that. Typically
17 that will involve the requirement to get a synchronization
18 license.

19 Here, you have an actual visual, a footage, live
20 footage that was actually captured, and as an issue, we
21 don't have to debate that today as to whether or not you
22 actually need a so-called synch license for that. But let's
23 say for purposes of this argument, we do. Our position,
24 among other things, there are a number of defenses, legal
25 defenses and equitable defenses we've raised. The Court has

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2 read our papers. I'm not going to belabor them. But
3 specifically as it relates to the individuals whose
4 depositions we seek, we believe that consent was given by
5 these artists at the time they actually owned or controlled
6 their --

7 THE COURT: What's the basis for that belief?

8 MR. ELKIN: The information that our client has
9 gleaned from (inaudible) that were available at the time.
10 And I will tell Your Honor that there is another case that
11 was brought --

12 THE COURT: Your Honor, at page 13 of the
13 conference before Judge Ramos on September 23, you stated,
14 quote, page 13, line 13, "This is a case admittedly where
15 neither the plaintiffs nor, frankly, our clients have any of
16 the core knowledge, primary knowledge with regard to what
17 happened ten, twenty, thirty, forty years ago." So I ask my
18 question again, what's the basis for the belief that right
19 were given contemporaneously with the making of the
20 recordings?

21 MR. ELKIN: Your Honor, I was about to - I
22 appreciate that. I made that statement, as Your Honor
23 recounted, and I stand by that. It is based on
24 communications with the staff and witnesses who were at the
25 concerts at the time that these concerts took place. And I

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2 will tell you --

3 THE COURT: Were most of these concerts at the
4 Fillmore East or West?

5 MR. ELKIN: Many of them, many of them were.

6 THE COURT: Were there any written agreements
7 with the performers at those two venues that address the
8 issue of these rights?

9 MR. ELKIN: To the best of my knowledge, Your
10 Honor, I've not seen any agreement that pertains to it, and
11 I will readily concede that point. But if I may go on.

12 THE COURT: Go ahead.

13 MR. ELKIN: There was a - let me just, for the
14 record, before I say this, I just want to make clear there
15 are many instances with regard to the music compositions in
16 this case where the songwriters in question owned and
17 controlled the music composition copyrights at the time of
18 their performance. And just to give a few examples, I will
19 explain the relevance of the other case to which I alluded
20 in a moment.

21 Willy Nelson, there are two songs that are at
22 issue in this case. One is On the Road Again, and a Good
23 Hearted Woman. Both of them were, one was performed in a
24 concert in 1998, one was performed in a concert in 1983. He
25 owned the music compositions at the time of those particular

1 concerns. Mick Jagger and Keith Richards, which I'm the
2 Court I'm sure is well aware, I believe --
3

4 THE COURT: I have a pulse.
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6 MR. ELKIN: -- Rolling Stones -
7

(laughter)

8 THE COURT: I have a pulse.
9

10 MR. ELKIN: There's a song at issue in this case
11 called Brown Sugar. Concerts that are featured on our
12 client's website that are issue in this case were performed
13 in 1973, 1978. These copyrights --
14

15 THE COURT: I'm sorry to interrupt. One of the
16 overarching concerns I have is with respect to the age of
17 some of the performances and whether or not it's realistic
18 that people are going to have a recollection. How many of
19 the recordings that are at issue in the lawsuit are, yeah, I
20 guess recordings I guess is the right term, are more than 20
21 years old?
22

23 MR. ELKIN: I haven't tallied them up --
24

25 THE COURT: Ballpark.
26

27 MR. ELKIN: I don't want to get in over my skis,
28 Your Honor. But let's say that the great majority of them
29 are --
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31 THE COURT: It seems to me highly unlikely that
32 the individuals you identify in footnote 1 of your November
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2 18 letter are gonna have a recollection of who said what to
3 whom at the time of the performance.

4 MR. ELKIN: Your Honor, that's a fair comment,
5 but I mean --

6 THE COURT: Some of these are, you know, the
7 Fillmore closed in '71. That's 45 years ago.

8 MR. ELKIN: Your Honor, I can completely
9 appreciate your comment. If you can indulge me --

10 THE COURT: Okay.

11 MR. ELKIN: Let me just make a reference, and I'm
12 not gonna take you through, but I would just inform the
13 Court there are 15 instances of the kind that I just ticked
14 off that exist.

15 There was a case that was brought by the record
16 label counterparts of the music publishers are, that are the
17 denominated plaintiffs in this case. As Your Honor I'm sure
18 knows, there are three major music companies in the world
19 right now, one are Universal and Sony, and they each have
20 their publishing house counterparts. The record labels
21 together with certain artists had filed a lawsuit against
22 these very same defendants back in 2007, actually late 2006,
23 and the case went on through 2008. I know about that
24 because I was lead counsel in the case, and I ended up
25 taking the depositions of Carlos Santana and Robert Plante

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2 and Jimmy Page, and we took the depositions of at least a
3 dozen or so artists.

4 And I can't specifically make references right now
5 to exactly the questions and answer, although my colleague
6 here was with me during the time - she was much younger, and
7 I was a little younger when I took those depositions -
8 because they were restricted material. But I will represent
9 to the Court and will make a proffer that the witnesses who
10 readily had testified that they were aware of and had
11 consented and not at all opposed them being recorded at the
12 time, and never did they object to it. And I believe, based
13 on the legal principles --

14 THE COURT: I'm sorry, and the performances at
15 issue took place when?

16 MR. ELKIN: The performances in that particular
17 instance, harking back, I would say to some of these into
18 the 19, clearly the 1970's. I'm trying to remember whether
19 it went back beyond that, but let's I'll represent to the
20 Court somewhere in the 1970's. And I apologize for not
21 having more precise information.

22 THE COURT: That's okay. That's fine.

23 MR. ELKIN: And our position is, and, look, it's,
24 we may be successful, we may be not successful, but our
25 position is there's a lot at stake in this case. We are

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2 honing in on the synchronization issue itself. I know
3 they've got some problems with respect to the notice of
4 intent on the reproduction side. They're claiming that we
5 were late. It is true that in many instances we were late
6 on the 30 days, but the monies were paid on the compulsory
7 payments, and they were never returned, and we're gonna take
8 the position and we're gonna argue in those circumstances
9 that the license existed with respect to those
10 reproductions.

11 On the synchronization issue I'm not gonna address
12 the core legal issue, but in terms of the actual facts, we
13 are going to rely on what the performers, and there are
14 other witnesses that exist that were part of, for example,
15 Bill Graham's entourage who supervised these concerts at the
16 time, witnesses who we have deposed in other cases and who
17 will testify, we believe, as to the custom and practices as
18 to what happened at these particular concerns.

19 Now, that may or may not prevail in this case, but
20 for us not to be able to capture and perpetuate a piece of
21 evidence that I told the district court judge I needed at
22 the beginning I think would put us at a disadvantage.

23 THE COURT: Well, one of the other issues that
24 the plaintiffs raise is the delay that would be engendered
25 as a result of the depositions that you're seeking. I mean

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2 some of the individuals are originally from the United
3 Kingdom. I don't know if - I don't know where they reside
4 now. I don't know where Mick Jagger and Keith Richards or
5 Eric Burdon resides or where Peter Townshend resides. But
6 wouldn't permitting these depositions results in a very
7 substantial delay?

8 MR. ELKIN: Well, Your Honor, in fact, this was
9 an issue that I had raised with the district court judge at
10 the beginning at the (indiscernible) conference.
11 Originally, Mr. Slotnick had asked for a staged discovery.
12 I know Your Honor read the transcript. And I had made the
13 point that I felt the most salient depositions, at least in
14 our point of view, were the nonparty witnesses, and we
15 agreed for them to be taken in tandem. It wasn't until very
16 recently that document production was complete the judge
17 asked, and I'm sure you read this in the transcript, Your
18 Honor, judge asked me whether it would be okay, I didn't
19 want to initially, but would it be okay if we completed
20 document production before the depositions commenced. And I
21 said fine or okay.

22 And we raised the issue just as document
23 production was nearly final and we had been rebuffed by the
24 other side who now claims that they're unnecessary for the
25 very reasons that they articulate in their papers. I get

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2 it, I understand it. We're not groupies, Your Honor, we
3 don't want to do this just to have fun and meet old rock and
4 roll stars. And if Your Honor were to see fit to permit
5 these depositions to proceed, we're happy to abide by
6 whatever contours or collars are imposed.

7 But at the end of the day, the, you know, we'll do
8 whatever we need to do. We asked the other side for
9 addresses as opposed to just simply traipsing through, you
10 know, the telephone directories and trying to figure this
11 out. And if we can't, of course, we'll have private
12 investigators assist us.

13 Will it delay the proceedings? Your Honor, I
14 can't say that it won't. I can't say that it won't.

15 THE COURT: If there are witnesses in the U.K.,
16 you're talking about probably a better part of the year if
17 not longer.

18 MR. ELKIN: Your Honor, I can't disagree with
19 that. We both know that sometimes the time delays
20 associated with compliance with the Convention, and if
21 that's gonna govern the day, I don't know what I can say.
22 What I can say is that I agreed to abide by the notion that
23 document production would be complete. We raised the issue
24 as soon as it was nearing completion, and we are where we
25 are, and I respect the Court's observations.

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2 THE COURT: All right. Maybe there's some other
3 points you want to make. I didn't mean to cut you off with
4 my questions. If there are other points you wanted to make,
5 go ahead.

6 MR. ELKIN: No, the points I'd rather make are
7 the ones that are important to Your Honor because I think
8 the ones that we made are reflected there. I just - if it
9 would be helpful, I'll just make the following
10 representations as to the artists that so far we identified
11 that control their music compositions prior to the actual
12 concerts, I've mentioned Willy Nelson and Mick Jagger and
13 Keith Richards. There's Billie Joe Armstrong, Jay Edwin
14 Wright, they're the composers for the songs in Green Day.
15 David Byrne and Jeremiah Harrison, Talking Heads. I'm
16 messing up the pronunciation here, the Court will forgive
17 me. Steve Alaimo from the Allman Brothers. Christopher
18 Mark Robinson of the Black Crows. Carole King, Smokey
19 Robinson, Ziggy Marley, Peter Townshend, Michael Stipe,
20 William Thomas Berry of R.E.M., Van Morrison. We actually
21 had an agreement with Van Morrison. They dispute the bona
22 fides of it. Tito Puente --

23 THE COURT: Tito Puente's no longer with us.
24 (interposing)

25 MR. ELKIN: -- Oye Como Va.

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2 THE COURT: I know.

3 MR. ELKIN: And he had the copyright.

4 THE COURT: At any rate, the Sunnyside Garden in
5 Queens.

6 MR. ELKIN: I think the other points, I'm not
7 gonna belabor the points that are in our papers. Those are
8 some of the thoughts that I thought I would share with the
9 Court.

10 THE COURT: Well, let me ask you this, how many
11 of the recordings - how many of the recordings are of
12 concerts that took place in the last 20 years? You have a
13 ballpark figure on that?

14 MR. ELKIN: Your Honor, I would say a fairly
15 minimal amount. There's some that took place in the 1990's,
16 but nothing of recent vintage.

17 THE COURT: All right. Anything else you want to
18 add?

19 MR. ELKIN: No, Your Honor, appreciate the
20 opportunity - I understand that your question is directed
21 with regard to the depositions, and I, of course --

22 THE COURT: Yeah, we're just talking about the
23 depositions right now.

24 MR. ELKIN: -- to respond to whatever plaintiff's
25 counsel (inaudible).

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2 THE COURT: All right. Mr. Slotnick.

3 MR. SLOTNICK: Thank you, Your Honor.

4 MR. ELKIN: One thing I would say, Mr. Ranahan
5 reminded me, I'm sorry, Mr. Slotnick, I apologize.

6 THE COURT: Go ahead, go ahead.

7 MR. SLOTNICK: No problem.

8 MR. ELKIN: If the Court will permit. There are
9 a lot of parties here. There are 23 plaintiffs that were
10 grouped in six categories. This is a pretty significant
11 case from our client's point of view, and we're up against
12 pretty high stakes here.

13 THE COURT: Okay.

14 MR. SLOTNICK: Thank you, Your Honor. First of
15 all, let me try to address some of the things that Mr. Elkin
16 has said about sort of timeframes that the artists own the
17 copyrights with respect to these works at the time the
18 concerts were given and these ostensibly implied agreements
19 were entered into.

20 I did look at a couple of these yesterday. I know
21 that On the Road Again I think was a, I think Mr. Elkin
22 mentioned 1998. I know that the agreement in which Willy
23 Nelson transferred his rights to another publisher occurred
24 in 1990. I just happen to be looking at it. None of this
25 is mentioned in any of the defendants' prior correspondence.

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2 But we submit to you that if you look at the documents we've
3 provided, and we've provided every agreement, every
4 assignment, every copyright registration identifying the
5 owners and the transfers of owners, you could put together a
6 list which would match the date of the concert with the
7 dates of the transfers, and we could establish that, I would
8 think, a handful at best were situations in which the
9 artists actually owned the rights at the time of this
10 ostensible implied agreement that may have happened anytime
11 in the last 40 years.

12

You know, so I think the easy way to go through
this is to say, okay, nobody can take a deposition of
anybody where the rights were no longer held. Mr. Elkin
mentions the record label litigation, and I understand why.
He was very successful, and I would keep referring back to
it too. Except that's not this case, and you can try to,
you know, paint all of the plaintiffs with the brush of
major labels, but Universal, which is one of the major
labels, does not a publishing company entity that's in this
case. Sony is only jointly owned by Sony, Sony/ATV, the
publishing company. And, yes, Warner Brothers is in the
case. The other publishers are independent publishing
companies that would be offended if they were tied in any
way to a major label under any circumstances.

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2 Mr. Elkin also seemed to suggest that there are
3 numerous witnesses who he could much more easily take the
4 deposition of. He talked about the staff people, the people
5 at the concerts, the people that are ostensibly either under
6 defendants' control or people who worked for the predecessor
7 Bill Graham and the other companies.

8 THE COURT: I think --

9 MR. SLOTNICK: Why not take them first?

10 THE COURT: I think what Mr. Elkin was saying
11 though is that those individuals could testify to the
12 standard practice or what they understood to be the standard
13 practice, but I think the limitation was they couldn't say
14 whether or not a particular concert, a particular artist
15 said X, Y, and Z. I mean --

16 MR. SLOTNICK: That's not my understanding --

17 THE COURT: That's what I thought Mr. Elkin was
18 describing.

19 MR. ELKIN: That's correct, Your Honor.

20 THE COURT: Yeah, go ahead.

21 MR. SLOTNICK: Your Honor, you know, I too have a
22 pulse, and I had been backstage at concerts, and I can tell
23 you that it would astonish me if Mr. Jagger, whether this
24 concert was in 1967 or 2007, had any recollection of having
25 any conversation with anybody before a concert. That's not

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2 what happens backstage at a rock and roll show. And I
3 wasn't there in the 60's, but I hear tell the likelihood of
4 Mr. Jagger remembering anything from those days is probably
5 very slim.

6 Your Honor, this is a very different case than the
7 case that Mr. Elkin keeps referring to. This is a case
8 about musical compositions --

9 THE COURT: Let me just come back to the point
10 you just made though.

11 MR. SLOTNICK: Sure.

12 THE COURT: Some of the performers in the
13 footnote 1 to the November 18 letter are clearly artists who
14 had their, well, who were maybe more prominent in the 60's
15 and the 70's than they are today, but some of them are more
16 recent. I mean Green Day is a more recent - I know from my
17 son that Green Day is a more recent entrant into the field
18 of popular music than say the Band was. I mean is it - and
19 the issue of fading memories may be more of an issue with
20 respect to performers from the 60's and the 70's than Green
21 Day. I mean is it reasonable to assume - is the inference
22 or is the assumption of lack of memory as strong with
23 respect to the Green Day artists as it is with respect to,
24 say, Mr. Robbie Robertson?

25 MR. SLOTNICK: I think it is, Your Honor. I

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2 think obviously as someone who is no longer at the age of
3 Mr. Armstrong and closer to the age of Mr. Jagger, yeah, I
4 understand that there is obviously a change in recollection.
5 But what we are suggesting here is still Mr. Armstrong or
6 any of the other relatively younger people being able to
7 recall an event, and I use the word event advisedly, that
8 happened in the 1990's. This is not like there was a
9 concert four years ago or two years ago.

10

And, you know, for all of these sort of good humor
about what goes on backstage, these are all professional
musicians who are preparing to go to work, and what Mr.
Elkin seems to be suggesting is that whether it's 40 years
ago or 20 years ago somebody's gonna have a recollection not
of a document but of a, either a conversation or, seemingly
more strongly, an implication that by a wink and a nod these
artists granted someone consent to record the concert. And
not just record the concert; it's okay, I see you there, out
there, and I give you the consent to not only record it but
to commercially exploit that work forever and not pay me a
penny.

22

Now, if that's what the testimony's gonna be, I
mean I think I can testify for what these people are gonna
say. But the fact is that's what he's seemingly suggesting.
It is, as I said in my letter, this is a Hail Mary, you

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2 know, let's try to take all these depositions and let's see
3 if anybody remembers anything and has fond memories of Bill
4 Graham. There is nothing. There hasn't been any suggestion
5 from Mr. Elkin or from any of the staff people or witnesses
6 as to what the custom and usage of or any other aspect of
7 what goes on at a rock and roll concert. I've been to a lot
8 of rock and roll concerts; I've never seen anybody record
9 anything. Except illegally. I see that all over the place.
10 It's easier now.

11 MR. ELKIN: Your Honor, may I respond briefly?

12 THE COURT: Have you finished, Mr. Slotnick?

13 MR. SLOTNICK: Your Honor, again, I mean I don't
14 want to belabor the point about the fact that these are
15 musical compositions. They are owned by someone other than
16 these artists. They are owned in many instances by entities
17 other than affiliates of major labels. You know, these are
18 companies that have their own exclusive right under
19 copyright and are seeking to enforce those. And what Mr.
20 Elkin is suggesting is that someone who is a stranger to the
21 ownership of those rights, and in many instances by 40
22 years, can remember a conversation or less than a
23 conversation in which they may or may not have owned
24 anything at the time, gave approval or tacit assent to a
25 practice which was never authorized by the lawful owners of

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2 the copyrights in the musical works.

3 THE COURT: All right. Mr. Elkin, how many
4 recordings, again, ballpark are within the last ten years?

5 MR. ELKIN: Your Honor, I can't represent to the
6 Court that there have been any, although I'm sure there are
7 a handful.

8 THE COURT: Well, let me ask you this, would a
9 reasonable starting point be for you to depose the staff
10 first or take the affidavit to the staff first? I think you
11 referred to them as Bill Graham's entourage.

12 MR. ELKIN: The answer is that, of course, if
13 that's what Your Honor asks, then we'll do that. But could
14 I just have 60 seconds to respond to points --

15 THE COURT: You can have more than 60 seconds.
16 Go ahead.

17 MR. ELKIN: -- Mr. Slotnick raised because I --
18 what he said on his face seems awfully seductive if you
19 accept the premise. But the fatal flaw here is, not his
20 fault, he wasn't there as he readily admits, but I could
21 represent to the Court, again, based on sworn testimony of
22 some of the very same artists, that the way it worked isn't
23 exactly as Mr. Slotnick would ask you to believe how it
24 would work if it actually occurred.

25 What we believe the witnesses will testify, and

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2 this is just with respect to the so-called Bill Graham
3 concert, Presents concerts. We can talk about King Biscuit
4 Flower Hour and some of the other recordings if the Court
5 wants to indulge us in those discussions.

6 But what would happen in terms of the regular
7 occurrence is that you would have the performers and they
8 would be situated like let's say (indiscernible) on the
9 stand, and Mr. Hampton would be where he is, and he would
10 have a camera which is fairly close to the stage. And Mr.
11 Hampton and his entourage in this proverbial example would
12 be videotaping the entire concert.

13 What happened, whether it was Fillmore East or
14 Fillmore West or the Winterland, is that you would have the
15 artist, you know, Mr. Slotnick made the example, what
16 happens when these artists are about to go onstage, what
17 they would have is a closed circuit TV where they see the
18 actual visual images of the concerts that are taking place
19 and the performers that are actually going up in advance.
20 There's no way that these artists could have been aware, and
21 we haven't had one yet that denied the fact that they knew
22 that they were being videotaped. And the synchronization is
23 not for now and forever; it's whether or not they consent at
24 that particular moment in time.

25 In terms of the actual dates --

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2 THE COURT: I'm having a hard time concluding
3 that knowledge, that an artist's knowledge that he or she is
4 being recorded conveys a license to commercially exploit, a
5 royalty-free license to commercially exploit the recording
6 of the performance.

7 MR. ELKIN: It's a fair observation, and that was
8 the very same issue that was presented in the other case
9 that Mr. Slotnick referred to. And it's a fair issue, and I
10 think he can argue that, and maybe he'll be successful or
11 maybe he won't.

12 As it relates to the copyright ownership, we took
13 the copyright ownership of the individuals. They had to
14 provide the chain of ownership, as Your Honor well knows, in
15 terms of whoever's gonna be the claimant to the copyright,
16 and Miss Ranahan over the last 24 hours actually took the
17 information from their copyright registrations and their
18 chain of ownership information. So I don't know what
19 information Mr. Slotnick has with respect to On the Road
20 Again or any of these others, but we're relying on the
21 information, the chain of ownership that they actually
22 provided to us in a case. They actually did do that, and
23 that's how we were able to decipher the timeline.

24 MR. SLOTNICK: Your Honor, if I may.

25 THE COURT: Well, hold on a second. Why would

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2 not a reasonable starting point be for you to depose or
3 submit affidavits - let me back up a second, let me back up
4 a second. When your client acquired the recordings that are
5 in issue here, were any representations made by the vendor?

6 MR. ELKIN: So this is what happened. Fair
7 question. Number one, the vendor, let's just take the
8 example that we've been referring to in this case, because
9 there have been multiple acquisitions. The Bill Graham,
10 what we refer to as the Bill Graham archives. This was a
11 transaction that took place I think in or about 2002, 2003
12 from Clear Channel, which held the rights to the Bill Graham
13 Presents, the concert series part, and they were hiving off
14 the copyright related part of the business.

15 It is fair to say that our client acquired the
16 physical property and whatever rights it had with regard to
17 any property rights. There wasn't any --

18 (interposing)

19 THE COURT: That's a quit claim deed, I don't
20 know what I have, but whatever I have I'm giving to you.

21 MR. ELKIN: Yeah, I would say, yeah, in the
22 nature of the quit claim deed. So what our client did at
23 that time, it contacted people, and this goes back now 13
24 years, 14 years, a certain period of time, and it conducted
25 due diligence. There were a number of people who were

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2 formally associated with the Bill Graham Presents who were
3 active at the time. A number of these concerts actually
4 took place. Some of those representatives actually were
5 either working for Clear Channel or who had been acting as a
6 consultant for Clear Channel. And so there was extensive
7 due diligence done, and there were representations, and our
8 client, you know, obviously, like any business person, takes
9 certain risks based upon the due diligence that was
10 conducted and the representations and warranties in an asset
11 purchase agreement.

12 And so I certainly am not surprised by what we,
13 what the client was represented at the time, but would it
14 have been better had these performers actually provide
15 written agreements? Absolutely. But contrary to what I
16 think has been stated, I think we've informed the Court in
17 the very beginning that we would need these performer
18 depositions in order to help substantiate that particular
19 point.

20 Even if I were to take depositions of some of the
21 staff at the time, all they would be able to do is say, yes,
22 it was the custom and practice of Bill Graham to videotape
23 all the concerts. Yes, the videotaping was in the clear
24 presence of the performers. Yes, there was a closed circuit
25 TV that was in the anteroom of where the performers were

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2 being housed before they went out on stage. They could talk
3 about - they're not gonna be able to say yes, I own the
4 right to this particular moment in time. I didn't object, I
5 knew I was being recorded, and the kinds of things that I
6 think would be important if I'm gonna present credible proof
7 to try to put on a case or a defense. I can't do it, then I
8 have to obviously live with whatever defenses and facts I
9 have, but I think that's an essential point of what I
10 thought we would try to prove in the case from the very
11 beginning.

12

MR. SLOTNICK: Your Honor, if I may. First of all, none of the people who Mr. Elkin is referring to now generically have been identified on the list of witnesses in the initial disclosures. They would be useful people I think even if only to establish one side of the perspective of this rather than wasting an extraordinary amount of time and money on running around the world taking depositions of people who I'm gonna assume don't want to have their depositions taken.

21

I think that the distinction between this case, again, and the other case is that in this case, and I will go out on a limb and say by and large, and I think virtually all if not all of the 206 songs were owned by the plaintiffs prior to any ostensible implied license, were owned by the

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2 plaintiffs. In Mr. Elkin's other case which was brought by
3 record companies, those record companies did not have a
4 copyright interests in the recordings made by Mr. Graham.
5 They had contracts with artists that may have limited the
6 artists' rights to do certain things, but they didn't have a
7 copyright in those. They didn't own the film footage that
8 Bill Graham took. That's very different.

9 If the artist wants to agree to something, and I'm
10 still not sure I comprehend what an artist would've agreed
11 to under the circumstances Mr. Elkin identifies, so be it
12 for whatever rights the artist has. But if the artist
13 doesn't have rights to the underlying song anymore, then the
14 artist doesn't have the right to explicitly or implicitly
15 grant a license.

16 So if everything worked out exactly the way Mr.
17 Elkin would like for I believe 95 percent of the works in
18 issue, the artist --

19 (interposing)

20 MR. SLOTNICK: -- I didn't have the rights.

21 THE COURT: The artist wouldn't have the rights
22 to --

23 MR. SLOTNICK: Yeah, so who cares what, you know,
24 what he said if he said anything or knew that there was a
25 camera.

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2 While I can't testify to or represent what
3 happened in these depositions because we haven't seen them,
4 I've been doing this for a long time and I used to be a
5 transactional lawyer and I did deals for artists with King
6 Biscuit, and I can make a representation that whatever
7 rights were granted, the rights that Mr. Elkin is talking
8 about, at least with respect to my clients, none of my
9 artist clients would've been in a position to grant the
10 rights or would've granted them for any period of time that
11 would last to 2016.

12 THE COURT: Let me ask you a question. I mean I
13 presume if I deny - you know, I don't know what these
14 individuals would say. I suppose it's theoretically
15 possible that they might testify in a manner that supports
16 the defendant's position. They might testify in a manner
17 that supports your position. They might get on the stand
18 and say I never gave anybody rights to do anything. It was
19 a live performance, there was a camera there. I didn't know
20 if it was recording or if it was just a live feed to a
21 control room. But I certainly didn't give rights to anybody
22 to exploit a recording of the performance. They may give
23 testimony that might be very helpful to you.

24 I mean I presume though if I denied Mr. Elkin's
25 relief, you're not gonna offer testimony from any of these

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2 individuals. Is that right?

3 MR. SLOTNICK: I think that's correct, yeah. I
4 mean there's no --

5 THE COURT: Well, you'd be precluded I think. I
6 mean you can't, yeah, you can't say he can't take the
7 deposition, and you offer the individual as a witness.

8 MR. SLOTNICK: I think that's right. I think
9 that, again, you know, if the artist owned the rights at the
10 time, that might be a different category, but I don't think
11 he did. You know, I think that none of this is particularly
12 relevant to anything, at least insofar as the way that Mr.
13 Elkin is explaining this. If he wants to make his motion,
14 we would oppose the motion.

15 And by the way, Your Honor, I agree with you. I
16 have a suspicion that if these depositions went forward over
17 the course of the next year, I'd be happier with the result
18 than Mr. Elkin would. But I don't think that my clients
19 would be happy with the delay of a year and the expense of
20 running around the country. I know Mr. Elkin said it's a
21 three-hour depositions. It's a three-hour deposition after
22 a nine-hour flight each direction, and there is some
23 preparation. And if he takes those people, they make some
24 comments like, you know, I didn't really deal with that. My
25 manager did or my road manager or the other guys in the band

1 | Page 32

2 did. And now we're off to the races with three more
3 depositions.

4 THE COURT: Uh huh. Uh huh.

5 MR. SLOTNICK: Your Honor, if there were two
6 people and they were all located on the lower east side, you
7 know, I would be thrilled. But there's not two. There's
8 24, and they didn't own any rights to these songs at the
9 time.

10 THE COURT: All right.

11 MR. ELKIN: Briefly.

12 THE COURT: Yeah, go ahead.

13 MR. ELKIN: First of all, I think there are a
14 number of rights at issue that are getting conflated here,
15 which is a danger that I sought to prevent when I took the
16 Court through initially the different types of exploitations
17 our client had in the panoply of rights that we thought it
18 availed itself of. It's one thing to have an issue about
19 consenting to the synchronization of the music in
20 opposition. We get that, that's why we're here with regard
21 to these particular depositions.

With regard to the other activities, Your Honor,
the so-called on-demands streams and the linear broadcast
streams and all of that is covered by issues that have
nothing to do with this particular aspect of it. So the

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2 notion that somehow an artist who controls the music
3 composition that he or she is performing is agreeing or not
4 agreeing as to what's gonna happen down the road is
5 entirely, respectfully, and this is out view and our
6 position, irrelevant because there are other rights and
7 issues and legal effect with regard to all of that. The
8 issue is what happened at the time the initial
9 synchronization took place. We --

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(interposing)

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THE COURT: One of the points, let me ask you a
12 question --

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(interposing)

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THE COURT: Let me ask you one quick question.
15 One of the points that Mr. Slotnick made in his letter of
16 yesterday thought was that without the rights to the
17 composition, without the license with respect to the
18 composition copyright, as I understand it, none of the other
19 rights matter.

20

MR. ELKIN: They actually do matter in the
21 following respect because there are different things that
22 they're complaining about. One of the things they complain
23 about are the - most of this case has to do with the audio
24 portion not the audio-visual portion. The so-called
25 synchronization issue has nothing to do with audio only.

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2 That's covered by either, that's all essentially subject to
3 compulsory licensing. As Your Honor is well aware, about 70
4 percent of the music publishing business is all subject to
5 compulsory licensing, either under Section 115 to the extent
6 that it applies, as it does in this particular case, we
7 claim, the reproductions, or public performance, ASCAP, BMI
8 are operating under consent decrees, SESAC, of course, not
9 so. But there's no issue - there are issues that they
10 claim, they're just not relevant to this particular part of
11 it.

12 With regard to the - Mr. Slotnick just mentioned a
13 few moments ago, Your Honor, and I'm sure it wasn't lost on
14 the Court, that he readily conceded that if, in fact, these
15 particular performers own the music composition, if they own
16 the music composition, then it would be relevant because
17 they themselves actually control the music composition that
18 they're actually performing. The individuals whose names I
19 picked off, and this is just a list that's illustrative, are
20 13 performers who we know control the compositions based on
21 the copyright registrations and chain of copyright material
22 they provided to us in discovery. So I just don't
23 understand.

24 MR. SLOTNICK: Your Honor, first of all, let me
25 assure Mr. Elkin that the one thing I agree with him about

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2 is that we're here today dealing with the synchronization
3 issue. We're not dealing with the other issues, and to the
4 extent that we have - I mean I don't think you can get past
5 not having a synchronization license to deal with the
6 others. But we're not talking about mechanical rights
7 today, we're not talking about public performance rights
8 today. We're talking about the right to synchronize
9 something, and we're saying that the artists do not, did not
10 have the rights at the time.

11 And if Mr. Elkin wants to enlighten us, you know,
12 it doesn't have to be today, about which ones he believes
13 would have owned it, we may take a different position with
14 respect to that. But I don't believe he's gonna find any or
15 very many of those. And if there are - I mean I've looked
16 at the documents too, although probably not as recently as
17 Miss Ranahan has, and my recollection is that the artists
18 who are writers who granted licenses or granted assignments
19 to the publishers, who are either the plaintiffs or the
20 predecessors to the plaintiffs, did that long before any of
21 these concerts took place.

22 If I'm mistaken about that factually, then we
23 would have to reassess our position with respect to those
24 artists.

25 MR. ELKIN: Well --

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2 THE COURT: Let me, just one second, let me just
3 ask Mr. Slotnick a few questions here. Mr. Slotnick, one of
4 the things I'm thinking about is whether or not to try this
5 no a sample basis with perhaps maybe one or two of the
6 individuals listed in the November 18 letter. I'm not sure
7 that this has to be an all or nothing proposition. And
8 admitting, I mean sampling is imperfect, but, you know, I
9 appreciate that both sides have arguments here which I don't
10 think are trivial.

11 With respect to, I mean the artist that I
12 recognize as being of recent note are Mr. Armstrong or Mr.
13 Wright from Green Day. Just a few questions. Do you know
14 where they reside?

15 MR. SLOTNICK: I do not, Your Honor. I think
16 it's California, but I'm not sure.

17 THE COURT: And the Green Day concerts that are
18 in issue here or the recordings of the Green Day concerts
19 that are in issue, do you know whether or not those concerts
20 took place after the owners of the copyright and the
21 composition assigned those rights?

22 MR. SLOTNICK: I believe so, Your Honor, but I
23 don't have that information in front of me.

24 THE COURT: I see.

25 MR. ELKIN: Your Honor --

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2 THE COURT: I interrupted you. Mr. Slotnick
3 actually was in the middle of making some other points.

4 MR. SLOTNICK: Again, I think that, number one,
5 we think that the synchronization right, if you don't have
6 the synchronization right, the other rights fall apart. I
7 do understand that Mr. Elkin has different arguments with
8 respect to that. I understand that, I respect that. And
9 that's not why we're here today. We're here today solely to
10 deal with the question of synchronization which is
11 ostensibly the only thing the artists can talk about, to the
12 extent they can talk about anything.

13 In terms of a sampling, I guess anything is better
14 than 24. Whether or not they own the rights or not, it
15 would seem to me that we were gonna even do a sample, we
16 would have to weed this down between those who actually
17 might have owned the rights at the time --

18 THE COURT: We're on the same page.

19 MR. SLOTNICK: Okay.

20 THE COURT: That's why I asked the question about
21 the folks from Green Day. If they transferred the rights
22 before the date of the concert, what they said at the
23 concert's probably immaterial, if they said anything.

24 MR. SLOTNICK: Right.

25 THE COURT: Yeah. All right. Do you want to say

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2 something else, Mr. Elkin?

3 MR. ELKIN: I was just gonna say I think it's
4 actually certainly fair to look at the artists as to which
5 there's no really serious dispute as to whether or not they
6 control the music composition. What I would just - the
7 thing that I worry about with regard to starting with
8 someone like Green Day to the exclusion of some of these
9 others --

10 THE COURT: Well, the reason I mentioned Green
11 Day is that the Green Days concerts will be relatively
12 recent, and that's which I think you might have the greatest
13 chance of getting something beyond I don't remember.

14 MR. ELKIN: That's completely logical, and,
15 again, that would be something that would resonate with me
16 instantly if I didn't know something I'm about to tell the
17 Court. Which I believe that Bill Graham died in 1991 in a
18 helicopter crash. And I believe that many of these concerts
19 that took place before his death, I know there's a certain
20 way in which those concerts actually took place, and I'm not
21 as confident actually that the Billy Joe Armstrong, the
22 Green Day, was actually - I could be wrong, I don't have the
23 information in front of me so I don't want to get in over my
24 skis - this may or may not have been a Bill Graham Presents.
25 It could've been a King Biscuit, it could've been something

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2 else. We're mixing and matching different types of things.

3 So what I would suggest, if Your Honor would
4 permit this, is to maybe give counsel an opportunity to see
5 if we can agree - if the Court is going down the road with
6 regard to potentially entertaining a sample, if we could
7 confer among ourselves with regard to a list that we can at
8 least agree upon as to who owned the publishing, then that
9 would be something that maybe we could do before having Your
10 Honor actually rule on this.

11 THE COURT: I mean I'll tell you what my thoughts
12 are. My thoughts are maybe two of the artists, and two of
13 the artists who reside in the United States, so we're not
14 dealing with Hague Convention issues. And I guess the other
15 limitation is if Mr. Slotnick - it would have to be two
16 artists who owned the rights to the composition at the time
17 of the concert that's in issue or the time of the recoding
18 that's in issue. I take Mr. Slotnick's point, if the rights
19 were assigned on January 1 of 1995 and the concert took
20 place on February 1, 1995, it really doesn't matter what the
21 artist said in February. I think that's a fair point.

22 I mean do you think - I mean I appreciate that Mr.
23 Slotnick objects to any of these depositions, but I think
24 that maybe a sampling is a good place to start and see what
25 they say. And, again, you know, be careful of what you wish

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2 for. It may turn out we do a sampling, Mr. Elkin, and the
3 testimony from the sample witnesses is squarely in favor of
4 plaintiffs here, and maybe in a month or so maybe the
5 parties will be taking reverse positions. I don't know what
6 the witness would say and I guess nobody does.

7 But do you think you could confer and see if you
8 can come up with two witnesses or two of these individuals
9 who reside in the United States who unquestionably retained
10 the rights at the time of the concert in issue?

11 MR. ELKIN: Sure, Your Honor, we'd be willing to
12 do that.

13 MR. SLOTNICK: Obviously, we couldn't do it
14 today, but yes.

15 THE COURT: Right.

16 MR. SLOTNICK: Look, I'm not sure if we will
17 change sides on taking depositions. My own personal belief
18 is the first person to subpoena Mick Jagger loses in the
19 grander scheme of things. But I do think that we should take
20 a look at this.

21 THE COURT: I think you may have a problem
22 getting Mick Jagger or Keith Richards, but all right. So
23 let's see if you can work something out to take two as a
24 sample and see what they say.

25 MR. ELKIN: I was going to suggest, Your Honor,

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2 that we actually bring them here to 500 Pearl Street, but I
3 guess that's not in the offing.

4 THE COURT: I would probably get some phone calls
5 from the Chief Judge if we did that. Let's turn to the
6 documents. Everybody okay to keep going? Anybody need a
7 five-minute break?

8 MR. SLOTNICK: I'm turning the mantel over to Mr.
9 Dickstein. So I'm fine.

10 MR. ELKIN: We're fine if you are, Your Honor.

11 THE COURT: Okay. All right. I think the
12 documents that defendant is seeking here I think come down
13 to three categories. Documents regarding damages, documents
14 regarding communications with the artists regarding the Bill
15 Graham archive and the lawsuit, and documents regarding
16 plaintiff's use of defendant's website. Those are the three
17 categories that that are set out in Mr. Elkin's November 18
18 letter.

19 Let's start with damages, and maybe a good place
20 to start, maybe plaintiffs, with respect to damages, maybe
21 plaintiffs can start by telling me what you have produced so
22 far on damages.

23 MR. DICKSTEIN: Sure, Your Honor, and just to
24 give you some context, when we talk about the issue of
25 damages, I think what we're getting at is obviously a

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2 plaintiff in the Copyright Act can elect either statutory
3 damages --

4 THE COURT: Right, right.

5 MR. DICKSTEIN: -- or actual damages, but either
6 way, like the courts have said, the value of the plaintiff's
7 work in some way is relevant to that. There's also
8 obviously the issue of disgorgement of a defendant's profits
9 which is different issue that actually we have some concerns
10 with their documents, with the documents they've produced,
11 but we're not talking about that right now.

12 So in terms of establishing the value of the
13 plaintiff's --

14 THE COURT: What have you produced so far?
15 There's no mystery. I'm trying to get a handle on what you
16 have produced, and then I'm gonna ask Mr. Elkin why isn't
17 that enough. So, okay, go ahead.

18 MR. DICKSTEIN: Absolutely. So what we've done
19 we've gone to each of our publisher clients, and we said
20 give us information on the revenues that you've generated
21 through licensing these musical compositions over the past
22 three years, because that's essentially what our client's
23 business is, and for each of the publishers we've produced
24 Excel spreadsheets which come directly from the databases
25 they maintain in the regular course of business would show

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2 for each category of license that has been granted, the
3 amount of money, and I believe it's broken down by each
4 composition. So in some cases these very lengthy
5 spreadsheets. And you can calculate the total revenues that
6 have been generated for each song over that period. So
7 that's what we've given them on the revenue side.

In terms of the licenses which I know is an issue
that the defendants are keenly interested in, we've
produced, again, very, very extensive spreadsheets that
contain really all of the essential information in any of
the licenses that our clients have issued. Now --

13 THE COURT: Are the spreadsheets prepared in the
14 ordinary course of business or were they prepared for this
15 litigation or something else?

16 MR. DICKSTEIN: So, Your Honor, they were
17 extracted from databases that our clients maintain.

18 THE COURT: That are maintained in the ordinary
19 course of business.

20 MR. DICKSTEIN: Correct. They were extracted for
21 purposes of this litigation. And actually just this
22 morning, Your Honor --

23 THE COURT: Do you have a sample of one of these?

24 MR. DICKSTEIN: I printed out, I was only able to
25 print out one set because of the heft or these. But this is

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2 --

3 THE COURT: I probably just need to see one page,
4 something as a sample.

5 MR. DICKSTEIN: Sure.

6 THE COURT: Just show it to Mr. Elkin so he knows
7 what you're showing me.

8 (pause in proceeding)

9 THE COURT: Thank you. Is one of these, each
10 page is a separate record? I mean, in other words, one page
11 doesn't - the information on one page doesn't continue onto
12 page 2.

13 MR. DICKSTEIN: It's a little confusing, Your
14 Honor. Because of the number, the amount of columns in that
15 spreadsheet that exists, we couldn't fit all the columns on
16 one page. So you'll see, if you flip a few pages, you'll
17 see the same columns. But then if you flip a few pages
18 more, you'll start to see different columns. And I'm gonna
19 pretend that this is easy to follow at the spur of the
20 moment, but if you take a look at all the different column
21 headings, I think Your Honor will see the level of detailed
22 information that we provided. And I should --

23 THE COURT: Give me one second.

24 MR. DICKSTEIN: Sure, go ahead.

25 THE COURT: All right, there's a first group I

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2 guess of maybe ten or fifteen pages. The columns are
3 labeled license type, product, song ID, song title, writers.
4 Then about 15 pages in there are different labels: current
5 term status, exclusivity, customer, territory, terms, start,
6 end. So would line 1 on page 1 line up with line 1 on the
7 page that has the different labels?

8

MR. DICKSTEIN: That's right, Your Honor.

9

THE COURT: I see.

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MR. DICKSTEIN: If you flip even further, you're
11 gonna see another set of headings, including the dollar
12 amount which I showed Mr. Elkin just before I handed it up.

13

THE COURT: Okay.

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MR. DICKSTEIN: And I just want to also be clear,
15 Your Honor, that's a sample, that's a representative sample
16 of the type of document produced from one of the publishers.
17 There are others like it.

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THE COURT: All right, and I see one of the
19 sheets here, this I guess is the third set of columns, it
20 says term, fee, EMI share, net fee, NPS, term timing, term
21 use, publisher. And these are fully paid up licenses,
22 they're paid up at the front end?

23

MR. DICKSTEIN: I don't know the answer to that,
24 Your Honor. I think the answer is yes because if it's
25 showing NPS, that's a net publisher share, so that's the

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2 amount the publishers keep after paying royalties to their
3 artists, songwriters I should say.

4 THE COURT: So, in other words, the licensee pays
5 a fee at the front end as opposed to paying a fee every time
6 the composition is used?

7 MR. SLOTNICK: Your Honor, if I may, it depends
8 on the nature of the deal. In some instances, it would be
9 an advance paid at the beginning or a guarantee paid at the
10 beginning. In other instances, there might be a quarterly
11 payment based on what the terms of the agreement are. If it
12 were public performance monies, it would be quarterly coming
13 in from the various PRO's.

14 THE COURT: But in any event, the income from the
15 songs has been produced in one form or another --

16 MR. SLOTNICK: Yes.

17 MR. DICKSTEIN: Absolutely, Your Honor.

18 THE COURT: Okay. All right, is there anything
19 else you've produced on damages that I should know about
20 before I ask Mr. Elkin why this is insufficient?

21 MR. DICKSTEIN: Just other spreadsheets of that
22 nature related to other types of licenses that our clients
23 have issued, but along the same lines.

24 THE COURT: Okay. All right, Mr. Elkin, why is
25 insufficient?

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2 MR. ELKIN: Well, we appreciate the fact that
3 that was provided, of course. If this case is as easily
4 proven as Mr. Slotnick indicated it would be, then the
5 potential here for exposure is fairly significant. And as
6 the Court well knows and as the case authorities set forth
7 and the papers reflect, the jury would be permitted to
8 examine a whole host of factors related to the copyright,
9 the value of the copyright, how much money was lost in
10 respect of the activities that they're complaining of with
11 regard to our client, what the value of their copyrights are
12 as reflected in the activities they claim --

13 THE COURT: Well, I've got the Bryant Media list
14 in front of me.

15 MR. ELKIN: Okay. So here, number one, we don't
16 have - first of all, we have a limitation. We have a
17 limitation over our objection that went back three years
18 only. Now, the reason why three years was chosen, as I
19 understand it, was because it coincided with the statute of
20 limitations with respect to the claims. These claims, of
21 course, they've known about this - I don't want to jump
22 ahead to the communications and how, you know, when they
23 first went up on our website, but this activity's gone on
24 for nine years or so, and we're not saying that they're
25 preempted from filing this, but to go back and to have an

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2 arbitrary cutoff of three years, especially when you take
3 into account that licenses before three years that would've
4 been paid up would not have been included, that's one issue.

5 The second issue, you know, is that --

6 THE COURT: But then the other side of that coin
7 though is you're getting licenses that were entered into
8 last year that are going to go past the date of the trial,
9 or may go past the date of the trial.

10 MR. ELKIN: And that's fair. What I'm suggesting
11 only is that I think documentation related to the
12 exploitation of works that are at issue in this case in
13 terms of the value, you know, having a cutoff at three years
14 if it were material, we don't know what exists and doesn't
15 exist. If it's reasonably calculated to lead to admissible
16 evidence, we think it's an arbitrary period of time that's
17 insufficient. So that's one of the gripes that we have.
18 I'm just trying to be faithful to the question.

19 THE COURT: Well, I understand that, but I think
20 there has to be some time limit and why isn't, you know, in
21 terms of what the current value is or what the current value
22 I guess of the compositions is, why isn't three years a good
23 yardstick? I mean the popularity of songs waxes and wanes.

24 MR. ELKIN: Correct. And, frankly, it may be
25 helpful or not helpful, but if you were to go back at least

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2 to the time that they claim that our clients first
3 originally exploited their works, it would be well beyond
4 three years and probably closer to a decade.

5 But let me just move on if I may --

6 THE COURT: Go ahead.

7 MR. ELKIN: I just mention that up front because
8 it was an easy point to raise. Secondly, and there's no
9 dispute about this, these are documents that, extracts that
10 they maintain in their system, which I understand. It's a
11 good company, and that's what they do to be able to extract
12 information that they believe is important from a business
13 perspective.

14 But our perspective in looking at this from a
15 damages point of view would be that we would look at other
16 types of provisions that we think may have a bearing on this
17 issue. For example, in a publishing agreement or a co-
18 publishing agreement or an administration agreement that
19 covers the exploitation of this copyright, to what extent
20 are the exploitations for streaming and on-demand streams
21 or, you know, whatever types of exploitation are referable
22 in a license agreement, they're not spelled out in this
23 particular spreadsheet at all. All of that is relevant to
24 the issue of damages.

25 We don't know the extent to which the co-

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2 publishers, the songwriters, who all may or may not have a
3 chance to co-publish, you know, reserve rights to themselves
4 to ostensibly license the compositions to others. We have
5 not seen the underlying agreements. We asked for them; they
6 have flatly refused. And we believe that those documents
7 have a bearing.

8 The third issue, Your Honor, has to do with
9 internet services. I'm sure it's not lost on the Court that
10 all of the recordings here in one way, shape, or another are
11 ones that our clients are accused or alleged to have
12 committed wrongdoing based on online distribution or
13 streaming. We've asked for various agreements that we know
14 that they have, and they include such companies as YouTube,
15 Vivo, Daily Motion, and a company by the name of Kello, K-E-
16 L-L-O. These are all companies that I'm sure they have
17 agreements with. Unless they have excluded our clients'
18 specific works, they should turn them over. They've not
19 given them to us. We have no understanding as to how they
20 actually value, view the actual activities in this
21 particular case itself.

22 The last thing I would say, and it relates to the
23 nature of the copyright violations that have been asserted
24 in this case. They have asserted not only have our clients
25 committed copyright infringement, Your Honor, but they've

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2 said it's willful copyright infringement. And that brings
3 up reactive potential factors that a jury's gonna have to
4 consider. You know, to what extent are they damaged by
5 pirated works, by works that they claim are unauthorized in
6 the area of streaming, in the area of downloading, in the
7 area of synchronization, or whatever else they're claiming
8 in this case? There are a number of requests that are laid
9 out in our letter that are reflected in this document --

10 THE COURT: Well, no, but I mean they're seeking
11 statutory damages, so they don't need to show lost profits.

12 | MR. ELKIN: Well, with regard to --

13 THE COURT: You started by talking about
14 willfulness. I mean what in in the licensing agreements is
15 going to illuminate the nature of your client's alleged
16 infringement as to whether it was willful or not?

17 MR. ELKIN: I apologize. I moved on from license
18 agreements and I moved on to a different category of
19 documents which relate to damages.

20 THE COURT: All right, go ahead.

21 MR. ELKIN: With regard to - so let me just
22 repeat some of what I said, maybe I went too fast, because I
23 want to make sure the Court tracks at least the points that
24 our side is attempting to make.

One is with regard to the license agreements. I

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2 think I discussed or attempted to articulate some of the
3 issues that we think would be reflected in the agreements.
4 Not one has been turned over.

5 THE COURT: Well, what is it in the license - you
6 talked about a couple of things in the licensing agreements
7 that are not in the spreadsheets, you know, whether or not
8 the license or there's some reservation of rights. Well --

9 MR. ELKIN: Streaming.

10 THE COURT: To what extent does the license cover
11 streaming?

12 MR. ELKIN: On-demand streams. Downloads. How
13 they account for that, you know, what are the - we know that
14 there is a different - we expect, and based upon what we
15 have understood to be in other agreements, that there would
16 be a delineation with regard to how they actually value the
17 things that are not actually fungible, and they're claiming
18 exploitations in a number of different respects. None of
19 that is broken down. We don't know how they licensed. They
20 are coming to court seeking to, for a damages award which
21 could exceed \$30 million, and they're not turning over any
22 one physical agreement that even gives us any inkling at all
23 as to how they actually exploit these properties themselves.

24 THE COURT: Well, how many license - do you know
25 how many licenses are at issue? Has someone counted the

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2 lines on the spreadsheets?

3 MR. ELKIN: And my under - sorry, Your Honor?

4 THE COURT: Do we know how many licenses we're
5 talking about?

6 MR. DICKSTEIN: I think that one exceeds a
7 thousand, Your Honor, if I'm not mistaken.

8 THE COURT: And this is a sample?

9 MR. DICKSTEIN: That's from one publisher,
10 correct. And one type of license. I believe that's the
11 synch license chart.

12 MR. ELKIN: And one of the things, just to give
13 you a sense, Your Honor --

14 THE COURT: I'm gonna get back to you one second.
15 Do we know overall how many licenses we're talking about?

16 MR. DICKSTEIN: Of all (indiscernible) mechanical
17 synch performance, no, Your Honor.

18 THE COURT: Tens of thousands?

19 MR. DICKSTEIN: Fair to say if not hundreds.

20 MR. SLOTNICK: At least.

21 THE COURT: All right, go ahead, Mr. Elkin.

22 MR. ELKIN: They've excluded reports, they
23 excluded from the reports revenues that basically provide
24 for internet exploitation. You know why? Because it's
25 actually not done on a per song basis. We think that's

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2 arbitrary. I don't understand how we can be expected --

3 THE COURT: I'm not sure I - maybe you want to
4 explain that point. I'm not sure I understand you. You
5 said they've exploited revenue for internet exploit --

6 MR. ELKIN: Well, there are a number of
7 agreements that we know they've entered into that they have
8 refused to turn over. And some of those agreements, I think
9 if you take a look on page 9 of my November 18, 2016 letter

10 --

11 THE COURT: One second, let me get there. All
12 right, page 9 of November 18. Go ahead.

13 MR. ELKIN: Right, it's the first paragraph, Your
14 Honor, where we make reference to the fact that there are
15 three agreements or arrangements they have with YouTube,
16 Vivo, Daily Motion, and Kello, Q-E-L-L-O. And we believe
17 these agreements permit the exploitation of plaintiffs'
18 music compositions over the internet in whatever forms those
19 arrangements actually envisage, and they have refused to
20 produce them because ostensibly they do not specifically the
21 songs at issue, even though they clearly would extend and
22 apply to the songs.

23 We say that because of the fact that there's, in
24 any of these internet deals, I would say the vast majority
25 of them, they're either full catalogue deals or they're

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2 portions of catalogues. Now if they have licensed these
3 internet services with part of their repertoire that
4 excludes our clients' works, okay, fine, we get that. But
5 if it's not excluded, why would it be permitted to actually
6 look at the terms of the various agreements that envisage
7 the very same exploitation they're claiming our clients
8 engage in in this case.

9 MR. SLOTNICK: Your Honor, if I may.

10 THE COURT: Go ahead.

11 MR. SLOTNICK: What Mr. Elkin is referring to, as
12 he said, is a full catalogue or a blanket license.

13 THE COURT: Those are the licenses you have with
14 YouTube, Vivo, Daily Motion, and Qello?

15 MR. SLOTNICK: Yes. I can't give you statistics
16 for each of the plaintiffs, but there are 206 songs total in
17 this complaint, which seems like a lot until you consider
18 that Sony/ATV alone has 2 million songs in its catalogue.
19 Warner/Chappell has a million songs in its catalogue, and we
20 have four other defendants smaller but still significant.
21 So we are talking about probably in excess 3.3, 3.4, maybe 4
22 million songs, and what Mr. Elkin wants to do is see an
23 agreement that does not identify any one song in order to, I
24 mean I'm not even sure if he's really looking for the needle
25 in the haystack here, but 206 songs, while admittedly a lot

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2 of songs in an infringement case, is nothing compared to the
3 3 ½ million or 4 million songs that the plaintiffs own and
4 are being compensated on.

5 And ultimately whether they're being compensated,
6 you know, a dollar or not a dollar, all of the revenue
7 numbers are still being identified in the spreadsheets that
8 we've given. And Mr. Elkin mentioned --

9 THE COURT: So the revenue from the internet
10 exploitation is covered in these spreadsheets for the songs
11 --

12 MR. DICKSTEIN: That's correct, because it gets
13 broken down to the song level --

14 THE COURT: I see.

15 MR. DICKSTEIN: -- the revenue, and that's
16 reflected in the spreadsheets. Not the one we handed up,
17 but in spreadsheets --

18 THE COURT: Right, fair enough.

19 MR. SLOTNICK: Yes.

20 THE COURT: And from looking - and, again, I know
21 this is a sample, it doesn't, may not cover the internet
22 exploitation, but from looking at the spreadsheets, could
23 you tell whether or not it's internet exploitation, is the
24 licensee identified?

25 MR. DICKSTEIN: In the revenue spreadsheets, I

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2 don't believe it breaks it down for every license. I think
3 it does have categories, and I think internet is one of the
4 categories. I don't have that one in front of me, Your
5 Honor.

6 THE COURT: All right. So it sounds like the
7 information Mr. Elkin is talking about is derivable from
8 these spreadsheets.

9 MR. DICKSTEIN: In terms of the amount of
10 revenues.

11 THE COURT: For the internet.

12 MR. SLOTNICK: And certainly in the context of
13 damages, and, again, you know, the maximum we can go for,
14 should we chose statutory damages, is \$150,000 for each
15 song, which is around \$30 million. It's my understanding
16 that these songs in the last three years, all 206 of them,
17 have generated income of approximately \$90 million. So if
18 Mr. Elkin's question is whether these songs have some sort
19 of intrinsic value, I think the past three years shows that.
20 If we want to show that they have a value beyond that, you
21 know, if you look at - being someone more familiar with the
22 Rolling Stones than Green Day - you know, I suspect that the
23 Rolling Stones catalogue that's part of this, you know,
24 there's no one who is familiar with the music business who
25 wouldn't think that that is an extraordinarily valuable

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2 thing and virtually any one of those songs would be valued
3 well in excess of \$150,000. If I tried to sell Satisfaction
4 tomorrow, I think I could get my \$30 million from that,
5 although that might be a little high. Maybe not.

6 THE COURT: Yeah.

7 MR. ELKIN: May I respond?

8 THE COURT: Well, I mean, Mr. Elkin, this is the
9 problem I'm having. I mean there are factors that are
10 considered in assessing statutory damages, but it's not
11 mathematical calculation. That's why it's, I'm sorry, I
12 think I said (indiscernible) statutory. That's why it's
13 statutory damages and not actual damages. I mean why - I'm
14 not sure the fine, the narrow pieces of information you're
15 seeking are really that probative here. Given the cost of
16 retrieving the licenses and the number of licenses, you
17 know, I'm not sure it's worth the candle. But having said
18 that, go ahead.

19 MR. ELKIN: Thank you. First, let's examine the
20 factors that a jury has to be charged with in this circuit.
21 For willful copyright infringement, there's general
22 deterrence, there's special deterrence, there is value of a
23 copyright, lost profits, benefits gained, mitigating
24 circumstances, a whole plethora of different factors that a
25 jury is gonna be presumably instructed to consider as to

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2 where on the continuum a statutory damages award and
3 (indiscernible) are at issue in the case (indiscernible).
4 It's very nice to say it's \$150,000 a work, but when you
5 multiple that by the sheer number of works in this case, you
6 know, I complained about it, it could be a very significant
7 number.

8 Now, I appreciate it's a lot of work and I don't
9 come to this point lightly, either on this occasion or other
10 occasions, asking for documents beyond which I think we are
11 entitled. This is a case, they decided to bring it and they
12 have a right to bring it, clearly have a right to bring it,
13 but it is a case nonetheless that's brought by the National
14 Music Publishers Association, 23 plaintiffs brought this
15 case, and they've asserted claims for all of these works.
16 And they can't even produce, they can't even produce four
17 agreements, four, and, frankly, I don't even know whether or
18 not those spreadsheets actually reflect, you know, the
19 internet. It does matter, it does matter. Because they're
20 claiming on-demand streams and rights of reproduction and
21 all these things, and I realize it's a lot of work and if
22 they want to work with us to try to cut down some of it, I'm
23 amenable, open for business to have those discussions.

24 But for them to say, you know what, we have a big
25 business, we've given you what we think is right based upon

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2 what we think works because it would be too much of a
3 burden, I don't think that's fair to our side, I really
4 don't. you know, I respect the Court's views and will abide
5 by what Your Honor decides, but I have to say, given the
6 stakes here and given the wide range of factors that are at
7 issue in deciding statutory damages, I think that their
8 production on damage documents should be a little more
9 fulsome.

10 THE COURT: Well, no, but I mean my understanding
11 though, Mr. Elkin, is that the licenses with YouTube, Vivo,
12 Daily Motion, and Qello are blanket licenses that aren't
13 gonna tell you anything about the value of your recordings.

14 MR. ELKIN: See, they're making a representation
15 that it's a blanket license. I haven't even seen it. How
16 am I supposed to depose their witnesses on it?

17 THE COURT: Well, I'm not sure anyone would come
18 to court, I mean I don't think any of the counsel at the
19 table here are gonna come to court and make a
20 misrepresentation in that regard. And I don't think anyone,
21 you know, you're all attorneys with very well-established
22 firms, very well-regarded firms. I'm not sure people are
23 gonna - I don't think people are talking off the top of
24 their head or talking without a basis in fact.

25 MR. ELKIN: So let's say some representative from

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2 the (indiscernible) or ABCO, that's a bad example because
3 they may not have actually been a signatory to this
4 agreement, one of their major, let's say EMI Music
5 Publishing, which is owned by Universal --

6 MR. SLOTNICK: Sony.

7 MR. ELKIN: Sony/ATV, and Sony uses a different
8 entity, but let's say one of their major music publisher
9 representatives is being deposed, and I want to examine him
10 or her about their licensing of music compositions that they
11 claim our clients exploited that are covered by an agreement
12 they have with YouTube. I'm gonna be there asking questions
13 about an agreement I don't even have a copy of. How could
14 that be, in a major copyright infringement case where
15 they're seeking \$30 million in damages, I don't have one of
16 the four agreements that exist in the case that relate to
17 the specific exploitation that's at issue?

18 THE COURT: Well, it doesn't relate to the - my
19 understanding is, based on what Mr. Slotnick just said, it
20 doesn't relate to the specific song. It relates to all
21 compositions.

22 MR. ELKIN: Of course it does, but --

23 (interposing)

24 THE COURT: So how does that tell you - how does
25 that tell you what the value of your recordings is or how

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2 does that illuminate the value of your recordings?

3 MR. ELKIN: I can see, based on the number of
4 sets per track, if, in fact, that's how it's denominated, it
5 may be denominated in some other way. How do we know on the
6 basis of the spreadsheet that counsel presented to Your
7 Honor how that is broken down? How would anybody know that?

8 THE COURT: Well, I mean maybe the answer to that
9 is for you to send a letter or send an email to plaintiff
10 and ask what, how do I identify a line on the chart as being
11 a license agreement for internet streaming or revenue
12 generated from a license for internet streaming?

13 MR. ELKIN: I will do whatever the Court asks,
14 but I just don't understand the burden of producing four
15 agreements, honestly. It's hard for me to fathom how
16 onerous that could be.

17 THE COURT: Well, I mean let me come back to
18 plaintiffs for a minute. With respect to the agreements -
19 tell me about the format of the agreements with YouTube,
20 Vivo, Daily Motion, and Qello. I mean do you know whether
21 or not it's royalties are paid on a, every time someone
22 views the song on YouTube or is it a blanket payment or
23 something else?

24 MR. DICKSTEIN: My understanding, Your Honor, is
25 that the payments ultimately filter through and they're

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2 assigned to the particular work. So someone watches a video
3 on YouTube that contains Satisfaction in it - I'm just using
4 this as an example --

5 THE COURT: Fair enough.

6 MR. DICKSTEIN: -- not what actually applies -
7 that ultimately the reporting will come through and show,
8 yeah, here is --

9 (interposing)

10 THE COURT: Someone viewed the Satisfaction video
11 --

12 MR. DICKSTEIN: Right. The agreement doesn't say
13 anything about Satisfaction. The agreement just says, you
14 know, and with respect, I haven't seen that specific one,
15 but it is a blanket license, as Mr. Elkin acknowledged. So
16 it says whenever anything in your catalogue that you've
17 claimed is played, we pay you some amount.

18 THE COURT: Again, I've never seen these
19 agreements. I'm just trying to think what they might look
20 like. It's a flat fee per all songs in the catalogue.
21 There's not like preferred, middle, and crummy songs.

22 MR. DICKSTEIN: That's my understanding, Your
23 Honor.

24 MR. SLOTNICK: There may be different categories
25 depending on the nature of the use. To use an imperfect

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2 analogy, you know, on an ASCAP statement, the value that is
3 attributed to something that is played on primetime
4 television, no matter what the song is, is greater than the
5 value of something played on local television in
6 Poughkeepsie at 4 o'clock in the morning.

7 THE COURT: Right, but that's not particular to
8 the song. It's particular --

9 MR. SLOTNICK: It's not particular to the song.
10 And in any event, all of that is still reflected as revenue.
11 So if the revenue number, if there is revenue that's
12 attributable to the song, then it's reflected in the books
13 and records of the publisher which is reflected in the
14 spreadsheet.

15 THE COURT: Just so I'm clear. So the licenses
16 with the four internet entities, the YouTube, Vivo, Daily
17 Motion, and Qello, assuming the same use, it would be the
18 same royalty whether it's Satisfaction or Tiny Tim singing
19 Tip Toe Through the Tulips.

20 MR. SLOTNICK: I believe that's correct. I was
21 privy to I think one of the original independent music
22 publisher, why get licenses with YouTube, and certainly
23 there was no reference whatsoever to any song. You know,
24 you couldn't do a deal that way. It would make no sense for
25 anybody.

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2 THE COURT: I mean with that information, Mr.
3 Elkin, I'm not sure how to, I mean if the rate is based on
4 all the songs in the catalogue, I'm not sure how it tells
5 you anything about the recordings at issue.

6 MR. ELKIN: Judge, respectfully, they haven't
7 even looked at the agreement. They're making
8 representations in court, and I respect each of these
9 lawyers. I've known Mr. Slotnick for almost three decades.
10 But I will tell you that they, for them to just make a
11 representation as to what's in an agreement they haven't
12 even looked at, something that we think is highly probative,
13 and they haven't even elected statutory damages. We're
14 talking as if, that they've made the election. Right now --

15 THE COURT: I think they have by virtue of these
16 --

17 MR. ELKIN: You can ask them.

18 THE COURT: Are the plaintiffs seeking actual
19 damages?

20 MR. SLOTNICK: Your Honor, while I'm not
21 committing to anything, I think it would be highly unlikely
22 that we would seek actual damages under these circumstances.

23 THE COURT: Well, I think you may need to because
24 I think the scope of discovery may change if it's actual
25 versus statutory.

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2 MR. SLOTNICK: That would be something that I
3 would have to confer with our clients about, but my
4 recommendation would certainly be to go for statutory
5 damages.

6 THE COURT: Let me ask one other question. I
7 mean I'm not sure this is gonna get Mr. Elkin what he wants,
8 but how burdensome is it to produce the licenses with
9 YouTube, Vivo, Daily Motion, and Qello?

10 MR. SLOTNICK: I don't know, Your Honor, I'd have
11 to find out. There are apparently some confidentiality
12 concerns with regard to those documents because of who the
13 licensees are. These are, you know, we're in a very
14 interesting world these days, and the documents are
15 confidential not just between the parties but between the -
16 obviously we would be very concerned about turning these
17 over to Mr. Elkin's client, but if publishers do individual
18 deals, blanket deals, I'm pretty certain that no one
19 publisher, whether a plaintiff in this case or not, would
20 want another publisher to have access or privy to a document
21 that's supposed to be confidential for obvious reasons.

22 The reason that Sony or Warner's or Peer or any of
23 the others license their entire catalogues individually is
24 to get hopefully a large sum of money. If one company's
25 large sum of money is different from another company's large

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2 sum of money, there's gonna be some 'splaining to do at some
3 level. And, frankly, I think that the flame here isn't
4 worth the candle.

5 Mr. Elkin knows what an internet license looks
6 like, he knows what a blanket license looks like. For the
7 same reason, you know, I suspect that he doesn't really care
8 that these songs are licensed through ASCAP, BMI, and SESAC,
9 and he's not asking for their specific agreements with ABC
10 TV or with any other content provider. None of it's
11 relevant to what the bottom line is, and this is a
12 discussion about damages. The songs have generated \$90
13 million worth of income in the last three years. That's
14 treble what the damages could be, and --

15 THE COURT: And that 90 million is reflected in
16 the spreadsheets that have been produced.

17 MR. DICKSTEIN: Correct.

18 MR. SLOTNICK: Yes.

19 MR. DICKSTEIN: If you add them all up.

20 MR. ELKIN: We have no idea --

21 THE COURT: Go ahead.

22 MR. ELKIN: -- first of all, how that's derived.
23 I should've started out by saying there is a protective
24 order issued in this case. If the nature of the material is
25 highly confidential, Mr. Slotnick and his team know how to

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2 designate that, for attorney's eyes only. This is something
3 that can be privy to outside counsel and our experts. Not
4 to have this because of the fact that they're confidential,
5 there are confidential documents --

6 THE COURT: Let me come back to the global
7 questions. I think maybe we're getting lost in the weeds a
8 little bit here. You're getting statements or you've gotten
9 statements which reflect the annual, which reflect for the
10 last three years the actual income generated to plaintiffs
11 by the songs, by the compositions in issue. Why isn't that
12 the best evidence as to the value of the copyrights?

13 MR. ELKIN: Judge, it's completely meaningless.
14 They could've received \$25 million for I Ain't Got No
15 Satisfaction in connection with a Pepsi commercial. We
16 don't know whether it's synchronization income versus
17 digital downloads versus public performance. It's - and by
18 what means? And what are the agreements? They don't
19 dispute the fact that, first of all, compensatory damages
20 are still in the case, and even if they were, the nature of
21 the harm that they claim is important.

22 A category of documents that we've asked for or
23 that we haven't discussed yet, and I don't want to tax Your
24 Honor's patience, this has gone on for a while --

25 THE COURT: You're not taxing my patience.

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2 MR. ELKIN: -- is the extent to which they should
3 produce documents with regard to claims as to the negative
4 effect on your business that piracy has caused. They're
5 gonna claim, they'll have someone that's on the witness
6 that's gonna be talking about, you know, how unauthorized
7 use of music has hurt their business, and they've lost X
8 millions of dollars a year based on this. We've asked for
9 those documents. They haven't produced those documents.
10 They refuse to produce those documents. We don't have those
11 documents, we don't have four internet agreements, we don't
12 have any of the, all of the agreements that they have with
13 the songwriters and the publishers. We don't have anything
14 that reflects the exploitation or anything broken down at
15 all.

16 We have those spreadsheets, and that's fine. They
17 can come to court with their 23 plaintiffs to seek \$30
18 million without even turning over four internet agreements.

19 MR. SLOTNICK: Your Honor --

20 (interposing)

21 THE COURT: Hold on one second.

22 (interposing)

23 THE COURT: Hold on one second. I'm looking at
24 the first page on the spreadsheet here, and the first column
25 in license type, and there's TV, merchandise, karaoke, video

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2 stage, commercial, corporate, multimedia. Are there a
3 discrete number of forms of licenses the plaintiffs use?

4 MR. SLOTNICK: I think in some instances it's
5 dependent upon what the plaintiffs use. In some instances
6 it's what the licensees would use.

7 THE COURT: So in other words, license type
8 doesn't denote a form of standard contract.

9 MR. SLOTNICK: It denotes a category. I think
10 multimedia is I think is a catchall that includes the
11 internet. You know, commercial would presumably be a
12 commercial synch license. You know, again, I'm not sure
13 what the significance of it is. Again, if we're only
14 talking about damages, you know, what, you know, what
15 difference does the document mean if someone gives you a
16 check for \$25,000 for a commercial use of the song? The key
17 from a damages perspective is here's \$25,000, and it's
18 reflected. Our clients have represented to us that every
19 number on there reflects all of the revenue for each of
20 these songs for the last three years, and it adds up again
21 to \$90 million.

22 You know, Mr. Elkin went off on I guess a phantom
23 expert that we're gonna have the injury due to piracy and
24 unauthorized duplication. I don't know if we would have
25 such an expert. We certainly don't have one at the moment.

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2 And when we have one, he's certainly free to see the report
3 and examine and cross-examine that witness.

4 You know, I mean I don't think it requires an
5 expert to acknowledge that when somebody steals from you,
6 and I'm not accusing his client of stealing, but when
7 somebody steals from you, you make less money than when
8 somebody doesn't. So, yes, of course --

9 THE COURT: It depends on what they --

10 MR. SLOTNICK: Well, yes, it does. But, you know
11 --

12 THE COURT: I used to do some trademark work, and
13 that was always one of the big debates, I mean the person
14 who buys the Rolex in Battery Park, is that really a
15 diverted sale from Rolex? Probably not.

16 MR. SLOTNICK: It's probably not, Your Honor, and
17 I mean I started as an anti-piracy lawyer at the Recording
18 Industry Association, and I agree with you, the person who
19 bought the 50 cent 8-track tape at the gas station wasn't
20 about to spend the \$4 it cost back then to buy the album.
21 On the other hand, when you multiple that by millions of
22 people on the internet, yeah, then it starts to become a
23 real number. I think back in the day when I was doing this
24 exclusively for a living, it was probably more public
25 relations. Now it's real money.

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2 THE COURT: I mean, Mr. Elkin, I'll hear you one
3 more time, but I really think that the spreadsheets, you
4 know, I think that in the very near future I think the
5 plaintiff needs to commit to statutory damages. But unless
6 the plaintiff changes track and seeks actual damages, I'm
7 really hard-pressed to see why the actual revenue generated
8 by the songs is not the best evidence here.

9 MR. ELKIN: I think we're - Your Honor, I
10 appreciate being heard one last time, but I - they have made
11 representations about what they think the agreement is.
12 They haven't even seen the agreement, and the argument
13 that's being presented is --

14 THE COURT: You're talking now about the four
15 with the internet?

16 MR. ELKIN: Yes, I'm referring to those, but,
17 frankly, all of the agreements that we've asked for. They
18 had one stack of paper from their database. Their
19 representations that I take counsel is making, and I have no
20 reason to doubt what they're saying, that their clients have
21 informed them of that, but that's a far cry from looking at
22 their files to come up with documents that are responsive to
23 our request that can lead to admissible evidence. How in
24 the way in which they have licensed their music for internet
25 distribution is something that is fundamental and part of

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2 this case. If I can't examine the court documents with four
3 major distributors, it's hard for me to understand what a
4 license would possibly look at if, in fact, our client had
5 actually entered into an agreement with them.

6 It's unfathomable to me that I can't have access
7 to it if that's the Court's ruling. I just - I feel that we
8 are at a tremendous disadvantage in defending this case.

9 MR. SLOTNICK: Your Honor, we're not talking
10 about the equating of the defendants who have a nice
11 business with YouTube who have a very, very nice business.
12 Mr. Elkin's client, if they were of a mind to license, could
13 license based on specified works for which they have a
14 physical embodiment. The internet where even the internet
15 companies don't have physical or non-physical embodiments of
16 anything because every one of us can put something up on
17 YouTube tomorrow.

18 What the terms of the license mean vis-à-vis
19 damages is irrelevant to what the revenue generated is, and
20 we are making the representation that the revenue is
21 identified. And he has those documents and he will be able
22 to examine a witness, and the witness will be able to
23 testify with great knowledge as to what the, what those
24 numbers mean and where they come from. And if he finds that
25 lacking at some point, then I suppose he has recourse to the

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2 Court.

3 But at this point to talk about a document that
4 has no reference to a specific song, has no reference to
5 distinguishing between one song and another in terms of the
6 more amorphous concern about valuation. The internet
7 doesn't care if it's Tip Toe Throw the Tulips or
8 Satisfaction.

9 MR. ELKIN: I beg to disagree, and I hope the
10 irony's not lost on the Court, that they can sit up here and
11 wave a \$90 million figure and talk about how, you know, they
12 don't really need to, the other side, meaning us, doesn't
13 need to know how it was all, all of the constituent
14 elements, but at the same time say, oh, by the way, you
15 shouldn't even try to compare yourself to YouTube because
16 you guys, it's like comparing apples to pears. They can't
17 have it both ways.

18 MR. SLOTNICK: Yeah, I don't think --

19 THE COURT: All right, I've heard enough. Look,
20 with respect to the licenses, at this point - with respect
21 to the damages documents, the request for additional
22 documents concerning damages, and I think these are the -
23 defendant has identified the document requests 11, 12, 28,
24 29, 39, 40, 46, 47, and 48. Those are the document requests
25 that are discussed at the relevant pages of defendant's

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2 November 18 letter.

3 I think the spreadsheets that have been produced
4 are sufficient at this point. If something changes in the
5 future, Mr. Elkin, I'm willing to revisit the issue. But,
6 you know, it seems to me that the actual revenue generated
7 by the songs in issue is probably the best evidence of the
8 value of the copyright.

9 The problem I have with the licenses for the four
10 internet entities, YouTube, Vivo, Daily Motion, and Qello,
11 is the representation has been made by counsel, and I'm sure
12 if counsel's incorrect, I am 100 percent sure they're gonna
13 correct it in short order. But I credit the representation
14 made by plaintiff as I credit the representations made by
15 defendants. Is that those licenses don't relate to specific
16 songs. They relate to all the songs in the license holder's
17 catalogue and they charge a standard rate for all the songs
18 in the license holder's catalogue.

19 So it really doesn't tell you anything about the
20 value of the compositions that are performed on the
21 recordings that defendant has. It sounds as if the rate is
22 an amalgam or an estimated value based on all the songs in
23 the catalogue which can total millions of songs. So it
24 really doesn't tell us how much - it doesn't bear at all on
25 the songs that are performed on defendants' recordings here.

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2 So I think that, you know, look, I'm willing to
3 revisit if things change in the future, but I think the
4 spreadsheets are sufficient. But I am gonna direct, I think
5 plaintiff does need to make an election here as to statutory
6 versus actual because then that may be something that would
7 warrant revisiting damages discovery here. Can you do that
8 in the next week?

9 MR. SLOTNICK: I'll try, certainly.

10 THE COURT: All right, so that'll be by the 14th.
11 All right. The next category the plaintiff, the defendant
12 identified, excuse me, are communications with the artists
13 regarding the Bill Graham archive and the lawsuit. And I
14 thought that non-privileged communications with the artists
15 concerning defendant's website have been produced.

16 MR. DICKSTEIN: That's right, Your Honor. My
17 understanding is that the defendants are asking for any
18 communications between the plaintiff, our clients, and the
19 artists related to any of the songs regardless of whether
20 they mention these defendants or their websites. That's the
21 way I understand the request. That's the way I understand
22 the request. And in our discovery response that we served a
23 year ago, we told them we were not gonna produce that. We
24 would just look for communications that mention the
25 defendants or their websites. And, in fact, we produced

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2 several of those.

3 Defendants say in their letter that none have been
4 produced. In fact, you know, just quickly looking, we found
5 a few, and I pulled them out, I have them with me here today
6 just examples. So we have produced communications with
7 artists that reference the defendants or their websites, to
8 the extent they're not privileged.

9 THE COURT: All right, Mr. Elkin. I think I may
10 have mischaracterized what you're seeking. It looks like
11 you are seeking correspondence between the plaintiffs and
12 the artists about all the songs at issue?

13 MR. ELKIN: Yes, that's correct.

14 THE COURT: You want to address that?

15 MR. ELKIN: I think I - if they're making a
16 representation that they have produced everything in
17 connection with that response, that was not my
18 understanding.

19 THE COURT: I think what they have - well, let me
20 not try to paraphrase. Why don't you --

21 MR. ELKIN: Oh, I --

22 THE COURT: Let me ask plaintiffs to describe
23 what they have produced.

24 MR. DICKSTEIN: Sure, Your Honor, we've produced
25 any communications with artists, between our clients and

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2 artists that reference any of the defendants or their
3 websites, and we went through an exercise almost a year ago
4 of setting out search terms that we'd use, which are not
5 surprisingly the names of defendants' websites, including
6 Concert Vault, Wolfgang's Vault, Bill Graham I think even
7 was a name we put in. And we collected our clients'
8 electronic records, conducted a good faith search. We then
9 ran the search terms against those records, and we produced
10 any non-privileged documents that we found as a result of
11 those efforts.

12 And they do happen to include some communications
13 with artists or their representatives, and we produced
14 those. I don't know that there's a great number, but there
15 are several, and we've produced those.

16 MR. ELKIN: If that's the representation, Your
17 Honor, I can't ask for something that they believe they have
18 produced.

19 THE COURT: Okay.

20 MR. ELKIN: We find it a little incredulous that
21 the little that has been presented, but it's something we'll
22 have to address in another way.

23 THE COURT: Well, all right. And the last
24 category, use of defendants' websites, requests 29 through
25 33. I'm not sure what you're looking for there. When you

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2 say their use of your websites, I'm not sure what you mean.

3 MR. ELKIN: Your Honor, may we go back to
4 communications because I think that Your Honor did correctly
5 identify one of the requests that we had called out.

6 THE COURT: Go ahead.

7 MR. ELKIN: There were other requests as well I
8 believe related to communications (inaudible).

9 THE COURT: All right, go ahead.

10 MR. ELKIN: So I think it's, take a look at page
11 9 of the November 18, 2016 letter. The requests I think we
12 identified were 56, 57, 58, and 60. And in a nutshell, it's
13 very difficult to raise the subject matter without coming
14 off as being charged. So I'm just gonna state as a matter
15 of fact what the background is and the documents that are
16 sought.

17 One of the defenses that we've asserted is that
18 this particular case was brought for an improper purpose.
19 Clearly, they are suing ostensibly for copyright
20 infringement, but we believe that there was a concerted
21 action at the behest of the National Music Publishers
22 Association and certain of its constituent members to drive
23 our client out of business for a number of reasons. And
24 there are communications that we believe were had of a non-
25 privileged nature among certain people, including David

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2 | Israelite who is the head of the trade association.

3 | THE COURT: He's the what?

4 | MR. ELKIN: Issued a --

5 | THE COURT: Did you say pet? He's the what of
6 | the trade association?

7 | MR. SLOTNICK: Head.

8 | MR. ELKIN: He's the head.

9 | THE COURT: Oh, the head.

10 | MR. ELKIN: President, CEO, I forgot
11 | nomenclature.

12 | THE COURT: Okay. All right, go ahead. Go
13 | ahead. I just didn't hear you at all.

14 | MR. ELKIN: He's the top guy.

15 | THE COURT: Okay.

16 | MR. ELKIN: And other individuals that act on
17 | behalf of at least one of the major music publishers,
18 | Alasdair McMullan. Mr. McMullan has claimed in a case not
19 | to be involved in the publishing side but on the sound
20 | recording side, but we know for a fact that he was directly
21 | in touch with our clients' representatives many months
22 | before the case and ostensibly sought information related to
23 | various activities complained of in the case and in the
24 | furtherance of self-potential business transaction when
25 | obviously it wasn't the situation at all.

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2 Initially, in response to our document demands,
3 there was no objection that was interposed. Now there's
4 been a decision not to produce them because there's a claim
5 that we only agree to associate the plaintiffs to produce
6 these documents while there was a, one of the counterclaims
7 that he (inaudible) was for defamation against Mr. Israelite
8 who issued a press release and made some quotes that our
9 client thought was defamatory. Now that --

10 THE COURT: Right, I know that that got dismissed
11 by Judge Ramos.

12 MR. ELKIN: The complaint got dismissed --

13 THE COURT: Yeah.

14 MR. ELKIN: That were received in an amendment in
15 regard to their response. And they've taken the position, I
16 guess when we pressed them most recently, that they're not
17 gonna produce those documents.

18 The claim as to defamation is not the, that's been
19 dismissed, is not the basis --

20 THE COURT: Let me interrupt you for one second
21 and ask you a question. You started by talking about
22 there's a theory, one of the defense is that the case was
23 brought for an improper purpose, namely, to drive the
24 defendant out of business. I mean my understanding is the
25 website sells things like tee-shirts and tangible items

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2 beyond the recordings of the performances, is that right, or
3 did I look at the wrong website?

4 MR. ELKIN: There are a number of different
5 websites. One of the websites definitely makes physical
6 items --

7 THE COURT: Posters, tee-shirts, yeah. But I
8 mean to the extent that you're claiming you're infringing,
9 why is driving your infringement business out of existence
10 an improper purpose?

11 MR. ELKIN: I think --

12 THE COURT: If someone's, you know, if I write a
13 novel and someone's business is to reprint copies of my
14 novel and sell it on the street, why is driving him out of
15 business an improper purpose?

16 MR. ELKIN: Constituents of their clients are not
17 on the defendants' side but on the major side actually tried
18 to do the same thing ten years ago in another case that was
19 withdrawn eventually. They realized they couldn't do that,
20 so they're going after the things now that they believe that
21 they can. So they learned from their mistakes and they're
22 going after things that are currently untested.

23 THE COURT: Well, but, in any event, why don't
24 you get back to the communications that you're seeking here
25 and tell me why they're appropriate.

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2 MR. ELKIN: We believe they're communications of
3 a non-privileged nature between Mr. Israelite and others,
4 other parties to this case related to bringing of this case
5 and issues related specifically, not simply with regard to
6 that, but of a business nature related to the various
7 defendants that we represent similarly with regard to the
8 representative of UMG.

9 THE COURT: And how does that bear on whether or
10 not there's an infringement?

11 MR. ELKIN: It doesn't bear on the issue as to
12 whether there's infringement; it bears on whether or not one
13 of our defenses to this case is, you know, we have evidence
14 that is in the possession of the other side that we can use
15 to support our defense.

16 THE COURT: Well, this is a defense of improper
17 motive or improper purpose?

18 MR. ELKIN: Correct.

19 THE COURT: I'm hard-pressed to see how that's a
20 defense to the extent they're alleging infringement.

21 MR. ELKIN: Well --

22 (interposing)

23 THE COURT: Why is terminating - if you got a
24 defendant that the plaintiff believes in good faith and in
25 compliance with Rule 11 has a part of its business that is

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2 infringing plaintiff's copyrights, why is not driving that
3 part of the business out of existence an improper purpose?

4 MR. ELKIN: We believe it's a copyright misuse.

5 In fact, there's evidence in the other case, I know Your
6 Honor - certainly Mr. Slotnick doesn't want to hear about
7 it, there's evidence in the other case that was precisely
8 what those, many of those plaintiffs in that case wanted to
9 do because of the fact that they wanted to own the
10 recordings, they were unhappy that these old vintage concert
11 recordings were proliferating on the internet, and it was a
12 problem for them, and this was a way to sort of drive him
13 out of business, by bringing on a case like this, suing \$30
14 million and trying to basically kick him out.

15 THE COURT: I'm still hard-pressed - look, I mean
16 if it is -- if your client is infringing or part of your
17 client's business is infringing, why is - I still don't
18 understand why driving the infringing business out of
19 existence is an improper purpose?

20 MR. ELKIN: First of all, let me just say at the
21 outset we are not infringing, we are --

22 THE COURT: No, I understand you deny the
23 infringement. I'm not suggesting that you are or you
24 aren't. But if you're not infringing, you're not gonna be
25 driven out of business, or that part of your client's

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2 business isn't gonna cease to exist. But why - if there is
3 infringement, why is not terminating - why is terminating or
4 seeking to terminate the infringement an improper purpose?

5 MR. ELKIN: We believe that if you bring on a
6 case with the goal of driving someone out of business is
7 inequitable defense. They may - they had a chance to get
8 that defense dismissed if they wanted to. It's alive in the
9 case. We're entitled to, we believe, seek discovery with
10 regard to it, and that's pertinent evidence that we don't
11 have that we want.

12 MR. SLOTNICK: Your Honor, Mr. Elkin keeps saying
13 that I don't want to hear about the other case. I actually
14 would love to hear about the other case, preferably not here
15 and today, but would be fascinated to hear about it. But,
16 again, let me distinguish the two cases briefly.

17 THE COURT: Well, let me ask you, before you get
18 in -

19 MR. SLOTNICK: Okay.

20 THE COURT: Is driving an infringer out of
21 business an improper purpose?

22 MR. SLOTNICK: No, and, first of all, I mean, you
23 know, I'm pretty sure that amongst our remedies that we've
24 asked for are damages and injunction. We've asked for
25 damages, the Court may award us \$30 million, the Court may

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2 award us \$30,000. I don't know. You know, that's something
3 that we all have to consider. Two hundred and six songs out
4 of whatever the defendants have eliminates 206 songs. It
5 doesn't eliminate everything else that they own and control.
6 And so I can't speak to what would drive them out of
7 business or not. But clearly any time a copyright owner
8 sues somebody for copyright infringement, the goal is to get
9 the infringer to stop. And if they, you know, and if
10 stopping means that they can't be in business anymore, you
11 know, then so be it. That's not improper. That's not what
12 misuse of copyright is. Never has and presumably never will
13 be.

14 You know, and the thought that a record company
15 lawsuit, which happened many years ago, by people who did
16 not own copyrights to anything is in any way indicative of
17 the rationale for bringing this case. It's just, it's
18 ludicrous.

19 There are independent publishers here who don't
20 talk to major labels. There are major publishers here who
21 don't talk to their sister labels. You know, they compete
22 for things. So it just is - knowing what I know, the
23 allegation is ludicrous. Know that what Mr. Elkin is
24 looking for are communications between somebody who was a
25 defendant and no longer is and someone who, whether he

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2 represents in-house record companies or publishers, neither
3 the record company nor the publisher is part of this
4 lawsuit.

5 THE COURT: Go ahead.

6 MR. ELKIN: Well, it is, abuse of copyright is a
7 defense. It's an equitable defense (inaudible) copyright
8 infringement. And the --

9 THE COURT: What the abuse here, what's the abuse
10 you believe is taking place?

11 MR. ELKIN: The abuse is that they brought this
12 lawsuit not to ostensibly remedy any copyright infringement.
13 They knew that we had licenses with the performing rights
14 societies. They knew we had licenses under Section 115 of a
15 compulsory nature. They knew that the synchronization, the
16 so-called synchronization is something that was not required
17 at the time and, if so, was already provided, and the
18 passage of time, statute of limitations, all kinds of other
19 equitable defenses. And they decided to do this.

20 Bringing on a lawsuit for a small company for \$30
21 million is enough to drive them out of business. They know
22 it, and we certainly feel it. And the other case certainly
23 did have copyright infringement implications, and it had to
24 do with the audio recordings, the counterpart to these music
25 compositions, so that's simply wrong.

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2 MR. SLOTNICK: Your --

3 THE COURT: All right, all right. Are you saying
4 that the complaint was filed in violation of Rule 11?

5 MR. ELKIN: No.

6 THE COURT: Well, if it wasn't - all right.

7 Well, I mean I'm gonna - to the extent that - this I guess
8 is, are requests 56 and 60, and I'm gonna deny the motion to
9 compel with respect to 56 and 60. It seems to me that the
10 information is just not relevant. I don't see how bringing
11 an infringement action that, unless there's a Rule 11
12 violation, I don't see how bringing an infringement action
13 to terminate the alleged infringer's infringing activities,
14 if the defendant is infringing, is somehow misuse of a
15 copyright.

16 MR. ELKIN: I respect and accept Your Honor's
17 decision. I just want to point out that I - Rule 11 is,
18 from our point of view, the diligence that the facts that
19 are set forth in the complaint and the legal principles
20 applicable have been done with due diligence and a bona fide
21 way, I don't think that the issue of whether it is being
22 brought for an improper purpose is necessarily reflected
23 within the four corners of the complaint. I realize that
24 Your Honor may not agree with that, but I just wanted to
25 make sure I made that point.

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2 THE COURT: All right. I think now we're to the
3 last category of documents, defendants - plaintiffs' use of
4 defendants' websites. I'm not sure what you mean there, Mr.
5 Elkin, with respect to their use of your website. What do
6 you mean - what does use of your website mean in the
7 document request?

8 MR. ELKIN: Well, let me just make a point, and
9 I'll try to describe it if I can. We believe that there are
10 certain defenses, at least in mitigation, not going to an
11 equitable nature, that arise from the fact that our clients
12 have allegedly been doing the very things that they claim
13 are infringing activity for a number of years. They're
14 going to come to court and try to seek, if they're
15 successful on liability, the good Lord willing they won't
16 be, but if they, they'll be seeking damages. One of the
17 things that we'd like to be in a position to do is to be
18 able to make a showing that, hey, look, if you believe you
19 are being damaged so much, you would've taken action at an
20 earlier time. It's really hard for you to come to court and
21 complain about the degree to which you've been damaged --

22 THE COURT: This sounds like laches.

23 MR. ELKIN: -- if you knew - no, laches is
24 different. I'm going to the heart of damages, not referring
25 to - laches is where I'm asking, where I'd be asking the

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2 court to find no liability based on the passage of time.

3 And I understand that (indiscernible) case Your Honor does
4 as well, and I'm not suggesting that laches, that this
5 evidence is being sought to promote a defense of laches.

6 But part of the showing that I suspect is gonna be
7 made in a case for copyright infringement is that what was
8 done here was so repugnant, so egregious, so heinous in a
9 relative sense, and we need to counteract that. It goes to
10 some of our equitable defenses to be sure, but it also goes
11 to the issue of willfulness, it goes to the issue of damages
12 associated with it, and specifically the documents and
13 information and evidence that we're seeking in connection
14 with these categories would permit us to say, would
15 basically go to the fact that there were representatives of
16 the plaintiff, if not the plaintiffs themselves, that
17 visited the websites which feature these allegedly
18 infringing compositions that are embedded in the recordings
19 that folks could either download or stream and time went on
20 and did nothing with regard to that until they finally
21 decided to bring a case that brings us all here today.

22 THE COURT: All right.

23 MR. ELKIN: That is what we're seeking.

24 THE COURT: Mr. Dickstein tells me in his
25 November 23 letter, and I quote, "Plaintiffs agreed to and

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2 have searched their electronic records for any non-
3 privileged documents or communications that reference any of
4 defendants or their websites. The search yielded thousands
5 of responsive non-privileged documents, the vast majority of
6 which plaintiffs produced this past July, almost four months
7 ago." Is he wrong?

8 MR. ELKIN: So my understanding is that they made
9 a representation with respect to their search terms, but
10 their representation seems to be, seems to contradict their
11 written response they would not actually produce documents.
12 If they sit here, if they stand up and they make a
13 representation that they have withdrawn that objection and
14 that they actually did conduct a diligent search and there
15 are no documents, then I would remove this for the Court's
16 consideration.

17 THE COURT: Well, no, this is not just them
18 standing up here and making an oral representation. This is
19 in Mr. Dickstein's November 23 letter. It's filed as docket
20 item 53. I'm looking at page 6 of that letter.

21 MR. ELKIN: Hold on one second, Your Honor.

22 THE COURT: Sure.

23 MR. ELKIN: I'll just get on the same page.

24 THE COURT: Sure.

25 MR. ELKIN: (inaudible) I apologize.

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2 THE COURT: November 23, page 6.

3 MR. ELKIN: Item C?

4 THE COURT: Yes.

5 (pause in proceeding)

6 MR. ELKIN: So I guess the point here, the
7 question that remains from our point of view, Your Honor, I
8 appreciate the diligence (inaudible) sort of digest what was
9 presented and I had read it before, but --

10 THE COURT: It's a lot of material to cover.

11 MR. ELKIN: Is that they seem to have represented
12 that they've actually searched for these documents. They
13 don't represent that they have agreed to turn over any
14 documents that have been yielded from that search.

15 THE COURT: No, they said they've already
16 produced them is their representation.

17 MR. ELKIN: But we're taking this I gather as a
18 representation that they produced everything they have.

19 THE COURT: Well, they produced the non-
20 privilege.

21 MR. ELKIN: That's non-privileged.

22 THE COURT: I think the language here is pretty
23 plain.

24 MR. ELKIN: Okay.

25 THE COURT: The plaintiffs state, quote,

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2 "Plaintiffs agree to and have searched their electronic
3 records for any non-privileged documents or communications
4 that reference any of defendants or their websites. The
5 search yielded thousands of responsive non-privileged
6 documents, the vast majority of which plaintiffs produced
7 this past July, almost four months ago." Now I guess
8 there's some wiggle in the representation, the vast majority
9 of which, I guess that suggests maybe there are some that
10 have not yet been produced.

11

MR. DICKSTEIN: I can clarify that, Your Honor.

12

That was just meant to refer to the fact that there had been
13 some small supplemental productions in July and some of them
14 were privileged. So they would've been listed in our log.

15

THE COURT: Okay. So everything that referenced,
16 every non-privileged document that referenced defendants or
17 their websites has now been produced?

18

MR. DICKSTEIN: Correct.

19

THE COURT: Mr. Elkin.

20

MR. ELKIN: Okay, then we accept counsel's
21 representation.

22

THE COURT: Okay. All right. It sounds like the
23 issues that plaintiffs may have with defendants' production
24 still need to be the subject of a meet and confer.

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MR. DICKSTEIN: That might be right, Your Honor.

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2 We've been getting productions as recently as late last
3 night, which may contain some material, although I don't
4 think all of it.

5 THE COURT: Well, if you just got it last night,
6 you have to look at it before you know, you gotta look at it
7 and then have the conversation with --

8 MR. DICKSTEIN: Well, actually, Your Honor, I did
9 look through it this morning, and there do appear to be a
10 few categories that are still outstanding.

11 THE COURT: Maybe the documents don't exist. I
12 think you need - have you had the meet and confer with
13 defendants' counsel?

14 MR. DICKSTEIN: Not since we've gotten the most
15 recent batch, but I don't think they actually address the
16 issues.

17 THE COURT: All right. Well, I'm not sure that
18 issue is ripe for today.

19 MR. ELKIN: Your Honor, may I put one more thing
20 on Your Honor's docket for a request.

21 THE COURT: Yeah, go ahead. Go ahead.

22 MR. ELKIN: We had made a request in the
23 circumstances where we still have ongoing discovery, and I
24 think there's still more documents that we are producing I
25 would say. We had depositions that haven't yet been

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2 scheduled. We will meet and confer with regard to that, and
3 we have this other issue now with regard to identifying the
4 sample of depositions constrained by Your Honor's order. We
5 would respectfully request an extension of fact witnesses
6 through February 28, 2017.

7 THE COURT: Is there any objection to that?

8 MR. SLOTNICK: No, Your Honor, we think that
9 makes sense. So we're not all trying to take people's
10 depositions on Christmas Eve.

11 MR. DICKSTEIN: Judge, I would also add, if you
12 don't mind, we had put a request in that if that date for
13 fact depositions are gonna be extended, we also extend the
14 other dates. There may be some impact on expert discovery
15 or requests that are made, what not.

16 THE COURT: I'm gonna grant the extension of fact
17 discovery to February 28. Can counsel submit a proposed
18 order that provides for a commensurate extension with
19 respect to the other operative dates?

20 MR. DICKSTEIN: We'll work with defense counsel
21 and submit that.

22 THE COURT: Okay. All right, that shouldn't be a
23 matter of disagreement. Do you want to schedule a date now
24 to discuss issues you may have with defendants' document
25 production?

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MR. DICKSTEIN: I think that's a good idea, Your

Honor.

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THE COURT: How much time do you need - are you

still producing documents, Mr. Elkin?

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MR. ELKIN: Yes, the answer is that I thought we

were not, but based on things that came to our attention

late last night, the answer is yes.

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THE COURT: When are you going to complete your

production?

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MR. ELKIN: I turn to Miss Ranahan. She's got a

frontline response for us.

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MS. RANAHAN: We had hoped to produce all this

week (inaudible).

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THE COURT: Well, I'm thinking about, I'm trying

to get the terminal date for your production and then give

you time to have a meet and confer, and then we schedule

another discussion to discuss plaintiff's issues with your

production. So when do you think you're gonna be done?

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MS. RANAHAN: We can be done by this month.

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THE COURT: December 31?

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MS. RANAHAN: Yes.

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MR. DICKSTEIN: And, Judge, I understand, you

know, counsel is pulling together document on an ongoing

basis. My only concern with that is how that might affect

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2 depositions, although even if we're gonna go into February,
3 if we get stuff end of this month and then we have to meet
4 and confer about what might be missing, come before Your
5 Honor, and then --

6 THE COURT: Yeah.

7 MR. SLOTNICK: Your Honor, perhaps I can offer a
8 solution.

9 THE COURT: Go ahead.

10 MR. SLOTNICK: Or at least something that may
11 work. I think whenever we have the next session with Your
12 Honor it should cover not only whatever document issues
13 there are, but by then presumably we will be able to meet
14 and confer with defense counsel about these two depositions
15 and who they are and see if we can try to figure out when
16 then may be, and then perhaps the February 28 date may be a
17 little bit more fluid than we're prepared to acknowledge at
18 the moment.

19 THE COURT: Well, give me one second. We can
20 probably squeeze something in either the week of the 19th
21 and I think I've got one day the following week, and then
22 I've got criminal duty the first week in January which
23 really makes it impossible to do anything in the first week
24 in January. I think I've got Wednesday - what does
25 Wednesday the following week look like? I think I've got

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2 something on that day?

3 THE CLERK: (inaudible)

4 THE COURT: No, no, no, Wednesday, the week
5 between Christmas and New Year's.

6 MR. SLOTNICK: Your Honor, my preference would be
7 the week of the 19th.

8 THE COURT: Yeah, what does the preceding week
9 look like? No, the preceding. Do you want to do the 20th
10 in the afternoon?

11 MR. SLOTNICK: It'll work for me.

12 MR. ELKIN: I don't have my calendar. It's with
13 my phone downstairs, but if I can't be here, I'll make sure
14 someone is.

15 THE COURT: All right. We'll say 12/20 at 2:30.
16 All right? You know, maybe, you know, you can discuss
17 document issues before then. It would certainly be helpful.
18 Maybe the defendants are just gonna have a few dribs and
19 drabs that're still gonna be outstanding. If 90 percent of
20 the production is complete on or before the 20th, maybe you
21 can start having a meet and confer before that. Because
22 after the 20th I'm really out of pocket until the second
23 week in January. And if you can get me a letter, get me
24 letters hopefully two days before, that'd be wonderful.
25 Okay? All right.

1 MR. ELKIN: Thank you for your time, Your Honor.

2 THE COURT: My pleasure. Anything else --

3 MR. SLOTNICK: Thank you, Your Honor.

4 THE COURT: Anything else from plaintiffs?

5 MR. DICKSTEIN: I'm sorry?

6 THE COURT: Anything else from plaintiffs?

7 MR. DICKSTEIN: I don't believe so.

8 THE COURT: Okay, anything else from defendants?

9 MR. ELKIN: No, Your Honor, thank you very much.

10 THE COURT: Okay, thank you all.

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12 (Whereupon the matter is convened to Tuesday,

13 December 20, 2016 at 2:30 p.m.)

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Signature

Carole Ludwig

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Date: December 11, 2016

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